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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 460

JACOB GREENES,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

Oct. Term, 1947

No. .....

Jacob Greenes, Petitioner

vs.

United States of America

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, dated August 21, 1947, affirming the judgment of the United States District Court for the Middle District of Pennsylvania, convicting him of conspiracy to commit an offense against the United States under Section 37 of the Criminal Code, 18 USCA, Section 88.

OPINIONS BELOW

The opinion of the District Court, denying the petitioner's motion for judgment of acquittal, will be found in the record at pages 925a-937a, and the opinion of the Circuit Court of Appeals will be found in the record at page 1223. As of this date, neither opinion has been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Third Circuit was entered August 21, 1947. A petition for rehearing was refused by the same court, September 30, 1947 (R. 1237). No opinion was rendered on this petition. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended; 28 USCA 347.

SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner, along with Albert W. Johnson, Donald M. Johnson, Miller A. Johnson, Albert W. Johnson, Jr., John Memolo, Hoyt A. Moore, Joseph Paul Jennings, Charles Korman, and David Schwartz, were indicted as co-conspirators, and charged with conspiring to obstruct justice in the Middle District of Pennsylvania, and to defraud the United States in violation of the provisions of 18 USCA, Section 88.

It was charged that the conspiracy began on or about February 1, 1934, and continued to December 31, 1944.

The indictment charged forty-six overt acts, covering eleven different cases or proceedings, in the District Court in which some action was claimed to have been taken by the defendant, Albert W. Johnson, who was judge of the said Court, in violation of his duty.

The indictment charged that in carrying out the conspiracy from time to time, various sums of money as gifts, presents or loans, or purported loans were made to, or received by the defendant, John Memolo, or your petitioner, or some of the other defendants, which were made and, in fact, received directly or indirectly by the judge himself, or through some of his sons. The purpose of the gifts was to affect the official acts of Judge Johnson.

The indictments against Hoyt A. Moore and Charles Korman were dismissed. The defendant, Joseph Paul

Jennings, died before trial, and a separate trial was granted as to David Schwartz. A jury acquitted Judge Albert W. Johnson and Albert W. Johnson, Jr. On appeal, the Circuit Court of Appeals for the Third Circuit reversed the conviction of Miller A. Johnson. The same Court refused to reverse the conviction of Donald M. Johnson, John Memolo and your petitioner. Petitions for rehearing were also refused.

In the indictment, forty-six overt acts, involving eleven cases, were charged against the defendants. All of these, however, save one, were eliminated from the case during the course of the trial. The overt act remaining, which affected your petitioner, was alleged as follows:

> "On or about July 9, 1943, Robert D. Michael, Trustee, by his attorney, filed a first and final account in the Central Forging case." (R. 1084)

The government contended that two additional overt acts not charged in the indictment were proven. One of these charged that your petitioner's brother gave Donald Johnson a check for $350.00. Your petitioner's brother testified that the check was given at the request of your petitioner, but that he had no knowledge of its purpose (R. 225a-227a).

The second overt act not set forth in the indictment, but which the government alleged was proven, was a meeting between Robert Michael, Donald Johnson and Miller Johnson. However, the court limited the effect of this alleged overt act to other defendants so that it did not affect your petitioner (R. 278a).

Summary Statement of Matter Involved

At the time of the trial, the special government prosecutor made prejudicial remarks concerning Hoyt A. Moore, senior partner of a famous New York law firm, and a witness for the petitioner. Among other things, he called Mr. Moore "a conspirator", "criminal conspirator", "holier than thou", and "Mr. Margiotti's particular pride and joy." He also charged him with swearing falsely, and stated that "he could buy the Judge any time" (R. 796a-798a). The District Court refused the defendant's motion for withdrawal of a juror, because of these remarks, and this ruling was affirmed by the Circuit Court of Appeals.

The Trial Court, in its charge, stated, "In the indictment in the case at bar, there are charged forty-six overt acts. As I mentioned a few minutes ago, some of them have been *proved* by the United States" (R. 821a). Counsel for the defendant objected to this portion of the charge, contending that it was up to the jury to find whether or not an overt act had been proven (R. 900a-902a). This objection was overruled by the Trial Court, and was not passed upon by the Circuit Court in its opinion.

QUESTIONS PRESENTED

1. Did the government prove the commission of an overt act in furtherance of the conspiracy within the statutory period of three years when the only acts proved within that period was one not set forth in the indictment, and another perfectly legal act of a trustee filing an account?

2. Did the Circuit Court err in affirming the trial judge's refusal to grant the petitioner's motion for acquittal on the ground of insufficiency of the evidence?

3. Did the Circuit Court err in affirming the trial judge's refusal to withdraw a juror and continue the case, because of the highly prejudicial and inflammatory utterance of the United States Attorney?

4. Did the Circuit Court err in affirming the action of the trial judge, in deciding that certain overt acts were proven, instead of submitting to the jury the question as to whether or not such acts were proven?

5. Did the Circuit Court err in affirming the trial court's ruling, admitting only a portion of the testimony given before the Grand Jury by the petitioner?

REASONS FOR ALLOWANCE OF THE WRIT

1. The opinion of the Circuit Court of Appeals is in conflict with the decisions of this court, relative to the requirement that an overt act be committed within the statutory period, in order to convict a defendant of conspiracy. *Brown v. Elliott*, 225 U. S. 392; 32 S. C. 812-815.

2. The jury was instructed by the court to restrict its findings to the forty-six overt acts alleged in the indictment, but the Circuit Court based its affirmance on an act not so set forth. The jury, therefore, did not follow the law as laid down by the court. This conflicts with the decisions of *Herron v. Southern Pacific*, 283 U. S. 91, 51 S. C. 383; *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740.

3. The decision of the Circuit Court is in conflict with the decision of the Supreme Court of the United States, as to requirements for a proof of a general conspiracy as set forth in the case of *Kotteakos v. United States*, 328 U. S. 750, 66 S. C. 1239.

4. The inflammatory remarks of counsel for the government were prejudicial.

5. The Trial Judge erred in stating to the jury that "Some of them [overt acts] have been proved by the United States."

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the

Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this Court, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals, had in the case numbered and entered on its docket, No. 9380, Jacob Greenes, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this court may seem proper.

October 28, 1947.

THOMAS D. CALDWELL,
Counsel for Petitioner.

Commonwealth of Pennsylvania,
County of Dauphin, ss:

Personally appeared, before me, a Notary Public, in and for said State and County, Thomas D. Caldwell, who, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein; that he has read the within petition and knows the contents thereof; that all the allegations in said petition are true to the best of his knowledge, information and belief.

THOMAS D. CALDWELL.

Sworn to and subscribed before me this 28th day of October, A. D., 1947.

Jean R. Greer,
Notary Public.

Reasons for Allowance of Writ

Certificate of Counsel

I hereby certify that the foregoing petition is, in my opinion, well-founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

THOMAS D. CALDWELL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Court below, the question of jurisdiction, and a statement of the matter involved have been set forth in the petition for a writ of certiorari.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals for the Third Circuit erred in the following respects:

1. In affirming the Trial Judge's refusal to grant the petitioner's motion for acquittal on the ground of insufficiency of the evidence, and that a general conspiracy was not proven.

2. In sustaining the Trial Court's holding that an overt act was committed within the statutory period.

3. In affirming the Trial Judge's refusal to withdraw a juror, because of the prejudicial utterance of the special United States prosecutor.

4. In failing to find that the Trial Court was in error in concluding that certain overt acts were proven, instead of submitting such a question to the jury.

5. In affirming the Trial Court's ruling, admitting only a portion of the Grand Jury testimony given by the petitioner.

ARGUMENT

I.

THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN YOUR PETITIONER'S CONVICTION, AND NO GENERAL CONSPIRACY WAS PROVED

The statute, under which your petitioner was convicted, is Section 37 of the Criminal Code (18 USCA Section 88), which reads as follows:

> "§88 *(Criminal Code, section 37) Conspiring to commit offense against United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

It was incumbent upon the government to prove beyond a reasonable doubt that there was a conspiracy or agreement between the several parties involved to commit an offense against the United States, and also to prove an overt act to affect the object of the conspiracy. It is our contention that the government has not met this burden.

The petitioner's counsel was strenuously contended from the very beginning of this case that this "one count"

indictment necessarily conceived Judge Albert W. Johnson, who was the presiding judge in the Middle District of Pennsylvania, as being "the heart—the core of the conspiracy to affect the administration of justice in that district." This view was accepted by the Trial Court. Judge Johnson was acquitted by the jury, and it is our contention that the entire conspiracy, therefore, falls, because if he is omitted from the case, each alleged act was a separate conspiracy and not a continuing one, and his removal from the case left nothing but a number of separate conspiracies. As the Trial Judge instructed the jury, it was necessary to find one conspiracy in order to convict any of the defendants. As the case now stands, such a finding would have been impossible.

This Court has said in the case of *Koteakos v. United States*, 328 U. S. 75, 66 S. C. 1239, that in a case where there was an indictment for single conspiracy, but the evidence showed a number of independent conspiracies: "The jury could not possibly have found from the evidence that there was only one conspiracy" (1249), and further said:

> "We do not think that either Congress, when it enacted Section 269, or this Court, when deciding the Berger case, intended to authorize the Government to string together for common trial eight or more separate and distinct crimes, conspiracies relating in kind though they might be, when the only nexus among them lies in the fact that one man participated in all."

See also *Canella v. United States*, 157 F. (2d) 470.

We realize that it has been held that common design, which is the essence of a crime of conspiracy, may be made

to appear when the parties steadily pursue the same object, whether acting separately, or together by common or different means. We submit that in the present case there is nothing to show a common design or purpose. There is no connection whatsoever established between the various acts alleged in the indictment, so that the burden of proof has not been met according to the requirements of the *Koteakos* case.

II.

THERE WAS NO OVERT ACT COMMITTED WITHIN THE STATUTORY PERIOD

The statute of limitations requires that an indictment in this case must have been found within three years after the offense shall have been committed (45 Stat. 51, 18 USCA 582). See *Brown v. Elliott*, 225 U. S. 392; 32 S. C. 812, 815.

The indictment in this case was filed September 11, 1945, and it was alleged that the conspiracy began on or about February 1, 1934.

The only alleged overt act within the statutory period affecting your petitioner was the imposition of a sentence by Judge Johnson on Theodore Koppelman. The sentence was entirely regular on its face, and the Trial Court charged the jury that nothing could be predicated upon the sentence. Another overt act alleged was the filing of an account on July 9, 1943, by Robert D. Michael, Trustee. This mere performance of a semi-judicial act in conformity

with law certainly cannot be construed as constituting an overt act in furtherance of a conspiracy.

As was stated in the case of *United States v. Biggs*, 157 F. 264, a conspiracy cannot be brought within the statutory period by merely alleging an overt act in the indictment which is within such period. The Court, in that case said:

> "The evident purpose of the pleader in inserting this overt act in the indictment is an attempt to toll the limitation of the statute." (274)

The government alleged additional overt acts not charged in the indictment. One of these was that Abe Greenes gave Donald Johnson, a check for $350.00. Abe Greenes testified that he gave this check at the request of the petitioner, but that he had no knowledge of the purpose of the check (R. I—225a-227a). The government also alleged that the petitioner was involved in the *Kizis* case in 1943. The Circuit Court, in its opinion, refers to the *Koppelman* and *Kizis* incidents (R. 1226). Attention is called to the fact that the only evidence concerning these overt acts was continued in Grand Jury testimony, and the Trial Judge charged that none of this Grand Jury testimony was to be considered as proof of overt acts, since it was not substantive testimony.

This would then leave only the cases of the Central Forging Company, which involved the filing of an account by the Trustee, Michael, and the Abe Greenes check.

The Central Forging Company had no application to your petitioner, who was not involved in any way. Only the Abe Greenes check incident is left. Johnson testified it was

in payment of an attorney's fee (R. I—684a). Abe Greenes said he did not know the purpose of the check (R. 227a). The jury should not, therefore, have been permitted to find "such transaction had as its purpose, the covering up of an illegal transaction, rather than a payment of an attorney's fee as Johnson testified."

Neither the *Kizis* case, nor the $350.00 check case was charged in the indictment. The Trial Judge, throughout his charge, stated to the jury that they would have to find whether or not the defendants committed the overt acts, as charged in the indictment. The Court used the following language: "In the manner and form set out an alleged indictment in this case" (R. I—813a). "No defendant could be convicted of an illegal, unlawful, improper, or other unethical act not charged in the indictment" (R. I—827a). Similar language was used time and again throughout the charge.

In the case of *Herron v. Southern Pacific*, 283 U. S. 91, 51 S. C. 383, it was said: "It is the duty of the Court to instruct a jury as to the law; and it is the duty of the jury to follow the law as is laid down by the Court."

We respectfully suggest that since the above charges were not laid in the indictment, the jury did not follow the law as laid down by the court, and your petitioner should be discharged.

III.

A JUROR SHOULD HAVE BEEN WITHDRAWN, BECAUSE OF THE PREJUDICIAL REMARKS OF THE SPECIAL UNITED STATES PROSECUTOR

The special government prosecutor referred to Hoyt A. Moore, a witness called by the defendants' Johnson, as follows:

> *"Yes, this fellow Moore. Mr. Margiotti's particular pride and joy. He can have him. I don't want him.*
>
> *That man, I will say it again, who goes to Europe for his holidays, who is supposed to be a leader of the Bar, that conspirator, because that is what he is. He is a criminal conspirator as established by the evidence in this case.*

He took that stand and you ladies and gentlemen will remember that attitude of Mr. Moore—holier than thou—and he took that stand and said that he had never discussed fees with anyone until after the property had been acquired, that he had never discussed this $250,000.00 with Memolo until the property had been acquired and the Circuit Court of Appeals had denied the appeal, and that was late in 1938.

Yet, on cross examination, when he was confronted by a letter that he wrote to Mumford, his local counsel, on October 7, 1937, you all know from the contents of that letter that that man Moore who had just gotten *through swearing falsely* that he had never discussed

fees with anyone until late in 1938—you know from that letter that he was writing and discussing fees on October 7, 1937, and all the explanations in the world cannot change that testimony nor that fact and Moore himself could not laugh it off by saying that he doesn't count that as a discussion of fees. If that letter to Mr. Mumford in regard to the fees of these receivers, ladies and gentlemen, isn't discussing fees, I wonder what in the name of God you would call it.

That man Moore! Yes. He could buy the Judge any time and the evidence showed that he did. A leader of the Bar!

(R. I—796a-798a)

Mr. Moore, a man of distinguished and genteel appearance testified that he is seventy-six years of age, a member of the firm of Cravath, Swaine and Moore. The firm was formerly Cravath, deGersdorff, Swaine and Wood (R. I—589a-590a). We believe that the Court will take judicial notice of the fact that this is one of the best known law firms in the United States.

Mr. Moore was never convicted of any crime. To brand him as a "criminal conspirator" after he had testified as a witness goes very low indeed in defamation. To criticize him as one who "goes to Europe for his holidays" (a trip was mentioned in his testimony) was obviously for the purpose of inflaming those members of the jury who might not be fortunate enough to be able to afford a vacation of this nature. It had no possible connection with the merits or the facts of the case and was clearly thrown in only for the purpose of arousing passion and prejudice.

The statement that he could "buy the Judge any time and the evidence shows that he did" was wholly unsupported by the evidence and bound to inflame the jury against the defendants.

We contend that on the authority of *New York Central Railroad v. Johnson*, 279 U. S. 310, 49 S. C. 300, judgment should be reversed if for no other reason than, because of the inflammatory remarks of counsel.

IV.

THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN FAILING TO FIND THAT THE TRIAL COURT HAS ERRED IN CONCLUDING THAT CERTAIN OVERT ACTS WERE PROVEN, INSTEAD OF SUBMITTING SUCH A QUESTION TO THE JURY

This question which was raised in the Circuit Court of Appeals was not specifically passed upon by that Court.

In its charge, the Trial Court said:

> "In the indictment in the case at Bar there are charged forty-six overt acts as I mentioned a few minutes ago. Some of them have been *proved* by the United States". (R. I—821a).

After the jury retired, the following colloquy took place:

> "'Mr. Margiotti: * * * Then shortly after the Court started charging on overt acts the Court used this language, "Some overt acts have been proven by the United States."

I was wondering whether the Court meant to tell the jury that as a matter of fact some of those overt acts were actually proven, and taking away from the consideration of the jury whether they were or whether they weren't.

From language following I gather that what the Court had in mind was that the Government had introduced some evidence of some of the overt acts mentioned in the indictment. The fact that the Court flatly told the jury that some of the overt acts have been proved might take away from them the right of passing upon whether those overt acts were actually proven.

I don't know if the Court recalls that language or not.

The Court: Oh, yes, I recall it.

Mr. Margiotti: I would take exception to that because I think that the facts are for the jury as to whether or not they have been proven.

I didn't believe that the Court intended to say as a matter of law that they had been proven and that the jury would not find, did not have the right to find that they were proven or not proven.

The Court: Well, they were proven.

Mr. Margiotti: All right. Then I take exception, if your Honor please, to that.

The Court: The Court wasn't telling the jury that they were done in accordance with and in pursuance of the conspiracy. Some of them were proven. You proved

some yourself. You proved the filing of the report of Michael, the first and final report in 1943, which is one of the overt acts charged.

Mr. Margiotti: You mean his report?

The Court: Yes.

Mr. Margiotti: Well, I assume that if any of the files have been proved—and there is no dispute about that—there is no question about them being proved.

The Court: That is what I thought.

Mr. Margiotti: It is just a question of whether they are overt acts as contemplated under the indictment.' "

(R. I—900a-902a)

(It will be remembered that by agreement the objection by counsel for one defendant would suffice for all defendants).

The Court did not thereafter correct this error but, as will appear from the above colloquy, had reaffirmed his position.

We feel that the Court fell into a serious misconception as to the meaning of the term, "overt act". We believe that these two words, standing alone, have no legal significance whatsoever. They are an abbreviation of the legal phrase, "overt act in furtherance of the conspiracy". There can be no innocent "overt act". The phrase denotes illegality of purpose.

Particular attention is directed to the one statement of the Court, above quoted, namely:

" 'The Court wasn't telling the jury that they were done in accordance with and in pursuance of the conspiracy. Some of them were proven. You proved some yourself. You proved the filing of the report of Michael, the first and final report, in 1943, which is one of the overt acts charged'."

From this, it is obvious that the Court felt that there could be an innocent "overt act" or a guilty "overt act". As pointed out before, this is not possible. The event in question constituted either an innocent happening or an "overt act in furtherance of the conspiracy". The event might be the opening of a door or the filing of a report by a trustee in bankruptcy. Neither of these acts is illegal in itself. Its innocence or illegality of purpose would have to be passed upon by the jury and the jury would have to decide that the event was illegal in purpose before it would constitute an "overt act in furtherance of the conspiracy".

It has been said:

" 'We are convinced that the questions whether a conspiracy existed as charged in the indictment and *whether an act was done* by one or more of the defendants *to effect the object of the conspiracy,* were clearly *questions* of fact *for the jury,* and that their verdict should not be set aside as against the weight of evidence.' " (Italics ours)

Marrash v. United States, 168 F. 225, 229.

It has also been held:

" 'And whether the alleged overt act *is such* is a *question of fact* for the *jury.* U. S. vs. Biggs (D.C.)

157 F. 264; Marrash vs. U. S. 168 F. 225, 93 C.C.A. 511.' " (Italics ours)

United States vs. Olmstead, 5 F. 2d 712, 714.

It has likewise been said:

" 'The indictment also charged that, for the purpose of the conspiracy to defraud the United States of its governmental functions, the honest, impartial, unbiased, and unprejudiced service and judgment of its officials was taken from it by fraud, with a view of enrichment of the conspirators, and the giving and taking of the money as alleged in the overt acts, were all acts to effect the object of the conspiracy and consummate the conspiracy. *Whether these acts did so or not were jury questions.* They were steps among many which entered into the conspiracy and to its fulfillment.' " (Italics ours)

Miller vs. United States, 24 F. 2d 353, 361.

It is clearly beyond question that in our case the Trial Court took away from the jury the power of deciding whether some of the acts relied upon by the Government were innocent acts or were "overt acts in furtherance of the conspiracy". Since this question was clearly for the determination of the jury and not for the Court, it amounted to substantial and fundamental error.

V.

IT WAS ERROR TO ADMIT ONLY A PORTION OF THE GRAND JURY TESTIMONY GIVEN BY THE PETITIONER

The petitioner had testified before the special Grand Jury on fifteen occasions. The Government offered in evidence as an admission against interest, or confession, his testimony on only two days (R. 1093-1094).

The defendant objected to this offer on the grounds that *all* of an admission against interest must be offered (R. 1098).

The Court ruled that the Government might offer the part above referred to. Inferentially, the ruling of the Court likewise limited cross examination to the same two days. This inference was forcibly brought out by the Court's statement as follows:

> "The Court: Well, there is no way, as I understand, that you can introduce that in the Government's case" (Original Testimony, 1043).

It is our contention that this ruling was error. Let us assume that the other days testimony contained contradictions of the portion offered. The jury may then have decided that no reliance could be placed in the defendant's Grand Jury testimony and have refused to predicate anything upon it. In a situation where the defendant did not take the stand (as in this case), the weight of the Grand Jury testimony was undoubtedly the deciding factor in a

finding of guilt or innocence. In fact, without this Grand Jury testimony there was practically no evidence at all against the defendant Jacob Greenes. If this testimony had been excluded, there is no doubt that Greenes would have been entitled to a directed verdict of acquittal on the grounds of a total absence of proof against him.

The principle of law upon which we base our contention has been followed both in our Federal and State Courts.

A Circuit Court of Appeals has held:

> " 'Conversations and declarations of the accused after his arrest formed no part of the res gestae, and in his behalf were inadmissible, but they were admissible against him if the prosecution saw fit to avail itself of them and when the U. S. proved the conversations and declarations and accused was entitled to have the full conversation or conversations given in evidence. This we understand to be elementary. * * * Where one part of a conversation is introduced the other party is entitled to all that relates to the same subject and all that may be necessary to fully understand the portion given.' "

Stevenson v. U. S., 86 Federal 106.

See also *U. S. v. Prior*, Federal Cases No. 16092, 5 Cranch CC 37.

Another Federal Circuit Court of Appeals held:

> "* * * 'Where part of a document or statement is used as self harming evidence against a party, he has a right to have the whole of it laid before the jury, who

may then consider, and attach what weight they see fit to any self-serving statements it contains.' "

Perrin v. U. S., 169 Federal 17.

A State Court held:

" 'The object of the party using such declaration or admissions against the party who made them is only to ascertain that which he conceded against himself; yet, unless the whole is received and considered, the true meaning and import of the part which is evidence against him cannot be ascertained. It is therefore a rule of evidence that the whole declaration or admission of the party made at one time shall be taken together; but the jury are at liberty to believe a portion and disbelieve the other, as they are all evidence.' "

Johnson v. Powers, 40 Vt. 611, 612.

See also *Newman v. Bradley*, 1 Dall. (Pa.) 240; *Levy v. State*, 49 Alabama 390; *King v. State*, (1915) 117 Ark. 82, 173 S.W. 852; *Coon v. State*, (1849) 13 Smedes and M. (Miss.) 246.

In view of the Court's statement,

" 'The Court: Well, there is no way, as I understand, that you can introduce that in the Government's case.' "

counsel for Greenes could not have elicited on cross examination from the witness for the Government, evidence as to what Greenes had testified to differently on thirteen other occasions before the special Grand Jury. This statement of the Court was likewise error.

It has been held:

> " 'Where the prosecution proves statements of an accused tending to show that he is guilty, the rule that a defendant in a criminal case has no right to introduce in evidence self-serving statements does not preclude him from eliciting on cross examination of the witness for the prosecution, the whole of the subject matter, even though statements so drawn out are favorable to him.' "
>
> *Commonwealth v. Britland*, 15 N.E. (2d) 657 (Mass.).

See also annotations appearing in 118 ALR 138 upholding this doctrine in many states.

It is, therefore, respectfully submitted that this case is one for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

THOMAS D. CALDWELL,
Counsel for Petitioner.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 459

DONALD M. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 460

JACOB GREENES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court denying motions for judgments of acquittal notwithstanding the verdicts (R. 925–937)[1] is not reported. The

[1] "R." is used herein to refer to the printed record filed pursuant to stipulation (R. 1239–1240). The designation "Tr." will be used to refer to the typewritten transcript filed with this Court, reference to which may be made by any party hereto under the terms of the stipulation.

opinion of the circuit court of appeals (R. 1223–1234) is not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered August 21, 1947 (R. 1235–1236), and petitions for rehearing were denied September 29 (Johnson) and October 3 (Greenes) (R. 1236, 1237). On October 24, 1947, by order of Mr. Justice Burton, Johnson's time for filing a petition for a writ of certiorari was extended to November 28, 1947 (R. 1237), and on October 28, 1947, also by order of Mr. Justice Burton, Greenes was granted a like extension to December 2, 1947 (R. 1238). Both petitions for writs of certiorari were filed November 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence sufficiently established a general, over-all conspiracy to obstruct justice as charged, and not merely a number of separate, disconnected conspiracies having no common figure.

2. Whether the evidence is sufficient to sustain the verdict as to petitioner Johnson.

3. Whether an overt act within the limitations period was proved.

4. Whether the trial judge correctly applied the doctrine of collateral estoppel in his instructions to the jury concerning the effect of petitioner Johnson's prior acquittal, of defrauding and conspiracy to defraud the bankrupt estate of the Central Forging Company, on their consideration of the evidence adduced against him in the instant case.

5. Whether a mistrial should have been declared because the prosecutor, in his rebuttal argument to the jury, called a defense witness a "criminal conspirator."

6. Whether the instructions concerning the weight that might be accorded to evidence of good character were correct.

7. Whether the jury were sufficiently cautioned that evidence of improper acts or of conspiracies other than the one charged would not justify verdicts of guilty.

8. Whether the trial judge invaded the province of the jury by telling them that some of the overt acts alleged had been proved, the context clearly indicating that by overt acts he meant acts in the objective sense, disassociated from their possible sinister character as having been done in furtherance of the objects of the conspiracy.

9. Whether it was proper to permit the Government to introduce in evidence the admissions against interest made by petitioner Greenes be-

fore the grand jury on two successive days, without also requiring that all his other statements before that body be introduced.

STATUTE INVOLVED

Section 135 of the Criminal Code (18 U. S. C. 241) provided in pertinent part during the period of the alleged conspiracy (February 1934 to December 1944):[2]

> Whoever corruptly * * * shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede * * * the due administration of justice [in any court of the United States] shall be fined not more than $1,000, or imprisoned not more than one year, or both.

STATEMENT

On September 11, 1945 (R. 1), an indictment (R. 1056–1086) was filed in the District Court for the Middle District of Pennsylvania charging that from February 1934 to December 1944 petitioners and eight other defendants—Albert Johnson, Miller Johnson, Albert Johnson, Jr., John Memolo, Hoyt Moore, Joseph Jennings, Charles Korman, and David Schwartz—conspired with one another and with other named persons, in violation of Section 37 of the Criminal Code (18 U. S. C. 88), to obstruct the administration

[2] The Act of June 8, 1945, c. 178, § 1, 59 Stat. 234, amended this section by increasing the maximum fine to $5,000 and the maximum term of imprisonment to five years (see 18 U. S. C., Supp. V, 241).

of justice in divers judicial proceedings pending in the District Court for the Middle District of Pennsylvania, in violation of Section 135 of the Criminal Code, *supra,* and to defraud the United States of and concerning its governmental function of having such proceedings considered and disposed of by that court in accordance with law and justice and, more particularly, of and concerning its right to the honest and faithful judicial services of the defendant Albert Johnson, as senior judge of that court, in such proceedings (R. 1057–1058). The indictment described, by names, docket numbers, and brief descriptions of their subject matters, eleven specific court proceedings allegedly affected by the conspiracy charged (R. 1059–1067). Forty-six overt acts were alleged (R. 1081–1086).[3]

Following a trial by jury petitioners and the defendants Miller Johnson and Memolo were found guilty (R. 920, 1218; Tr. 3966) and each was sentenced to imprisonment for two years and to a fine of $10,000 (R. 941, 942, 1219; Tr. 3977).[4] On appeal, the convictions of petitioners

[3] The indictment also set out in detail the manner in which the conspiracy was allegedly carried out (see R. 1067–1080).

[4] Judge Johnson and Albert Johnson, Jr., were acquitted (Tr. 3968). The indictment was dismissed as to Moore and Korman on their plea of the statute of limitations (Moore: *United States* v. *Johnson*, 65 F. Supp. 42; Korman: *United States* v. *Johnson*, 65 F. Supp. 46), and abated as to Jennings, who died subsequent to its return (see R. 1224). Schwartz was granted a severance because of illness (see *ibid.*).

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and Memolo were affirmed (R. 1235–1236), that of Miller Johnson being reversed on the ground of insufficiency of the evidence to sustain it (R. 1228–1230).

In view of the nature of the case, the complexity of the conspiracy involved and the numerous lawsuits around which it revolved, it is necessary to set forth at greater length than seems desirable the evidence supporting the convictions. The italicized headings in the following summary denote the names of the eleven court proceedings allegedly affected by the conspiracy, the evidence grouped under each such heading relating to that particular proceeding. Other evidence, not relating to any particular one of the eleven proceedings, is set forth under the heading "Additional Evidence." Some of the evidence consists of admissions against interest made by petitioner Greenes before the grand jury, which were admitted as against him alone (R. 1104; see R. 885). Such evidence is set forth below in brackets. Petitioner Donald Johnson and Miller Johnson are the sons of former Judge Johnson. Memolo, a local attorney, and petitioner Greenes worked with them, according to the Government's evidence, in selling Judge Johnson's judicial favors. The only other qualifying observations that need be made relate to the evidence in the *Central Forging Company* case, *infra*, pp. 30–34, at which point in the Statement the necessary explanatory facts are stated in marginal notes.

MOUNT JESSUP COAL COMPANY CASE

This was a bankruptcy proceeding which arose in 1925 (Ex. G–3, Tr. 348). In 1928 one Simoncelli, tax collector of the Borough of Winton, by his attorney, the defendant Memolo, filed a tax claim of $12,747.14 against the bankrupt (Ex. G–9, Tr. 357, 504–506). Claims for taxes were also filed by the Commonwealth of Pennsylvania and the United States (Exs. G–6, G–7, Tr. 353, 355). Patrick Kilcullen, who had been named special master by Judge Johnson to determine the respective priorities of these claims (Ex. G–10, Tr. 358, 507), first ruled that the Winton claim had priority over the others (Ex. G–11, Tr. 349–360, 507–513). At the instance of the United States, Judge Johnson ordered Kilcullen to reconsider this finding (Ex. G–12, Tr. 361, 514) and in February 1934 Kilcullen filed a second report, in which, reversing his original finding, he ruled that the claims of Pennsylvania and the United States had priority (Ex. G–13, Tr. 362, 514–518). On behalf of Simoncelli, Memolo excepted to this second report (Ex. G–14, Tr. 363, 518–519) and in July 1934 Judge Johnson reversed Kilcullen's second decision and reinstated his original finding in favor of the Borough of Winton (Ex. G–15, Tr. 365, 519–526, 539–547). Accordingly Judge Johnson ordered payment to Simoncelli of $20,496.10, the basic claim plus interest and penalties; he modified this order a few days later, directing payment of the basic claim immediately but sus-

pending payment of the interest and penalties until later (Ex. G–16, Tr. 366, 548–552).

Simoncelli testified that quite some time after he filed his tax claim Memolo told him that he would keep 50% of whatever money he recovered for Simoncelli (R. 13–15). He eventually received two checks from Memolo, the second being accompanied by a statement explaining the distribution of the money recovered (R. 15–17). This statement indicated that in November 1934 a check for $12,747.14 (the basic claim) was received by Memolo, of which amount exactly half was retained by Memolo as "Expenses paid," the other half being paid to Simoncelli; that in the following month a second check, for $7,748.96 (interest and penalties), was received by Memolo, of which amount exactly half was retained by Memolo as "Expenses paid"; and that from the other half, typing and notary expenses and Memolo's fee of $500 were deducted, the balance being paid to Simoncelli (Ex. G–97, R. 19, 21–22).

[Petitioner Greenes admitted before the grand jury that Kilcullen told him one day that he had a case in which "Mr. Memolo was interested" and which he thought "presented the possibilities of some fees" and that Greenes should "see Mr. Memolo about it" (R. 1105–1106, 1116). Kilcullen also told Greenes that he "was going to try to help Donald [Johnson] financially" (R. 1114). Greenes accordingly told Memolo to get in touch with Kilcullen, who would "act on the case favor-

ably or have the case worked on favorably for him" (R. 1116). Memolo thereafter dealt with Kilcullen directly (R. 1109, 1116). When Memolo received the money recovered on behalf of Simoncelli, he gave Greenes about $5,000 with directions to give it to Kilcullen (R. 1107, 1111). Greenes took $1,000 to reimburse himself for a loan he had made to Donald Johnson (R. 1109–1110) and tendered the balance to Kilcullen, but the latter directed Greenes to give it to Donald Johnson, who just then made an appearance (R. 1107, 1109, 1115). Greenes did so, stating that "it was the proceeds of the Mt. Jessup coal thing" (R. 1107, 1110).]

PENNSYLVANIA CENTRAL BREWING COMPANY CASE

This was a reorganization case which arose in 1934 (Ex. G–18, Tr. 374). Memolo was a trustee in the proceeding (R. 32–33).

Edward Maloney, an accountant, testified that he agreed with Greenes in 1939 to "go fifty-fifty" with him if Greenes would get him an appointment as auditor in this case. He thereafter received such an appointment. (R. 50–52.) Maloney worked for three months, and would not "ordinarily" have charged in excess of $1,500 for his services (R. 60–61, 100–101). He charged $4,973, receiving two checks for $2,500 and $2,473 on the orders of Judge Johnson (Exs. G–21, G–22, Tr. 377–378). Memolo told him how much to charge, and in fact prepared both his petitions

for fees (R. 52–54, 58). Maloney gave Greenes 50% of both payments pursuant to their agreement (R. 54–55, 59).

[Greenes admitted asking Donald Johnson, at Memolo's request, to arrange for Memolo's appointment as trustee. Memolo agreed to "play ball," i. e., "divide his fees," and Donald was satisfied that he would since he "did all right on his commitment" in the *Mount Jessup* case. At Donald's suggestion, Memolo asked Judge Johnson for the appointment and received it. (R. 1117–1118.) Memolo's first fee was $3,500. He gave Greenes half to give to Donald Johnson, which Greenes did, receiving $100 or $150 as his share. (R. 1118–1119.) Memolo received his second fee, $1,500, in 1943. Greenes went to get the 50% called for by the agreement, but Memolo refused to split this fee. The incident resulted in a fight between them, Memolo bodily ejecting Greenes from his office. (R. 1154–1157.) Greenes also admitted making the arrangements with Donald Johnson for Maloney's appointment in this case and giving Donald half of Maloney's fees, less "a couple of hundred dollars" for himself (R. 1120–1122).]

WILLIAMSPORT WIRE ROPE COMPANY CASE

In 1932 the Williamsport Wire Rope Company went into friendly receivership. Robert Gilmore and Charles Ballard were the receivers, and Oliver Decker their counsel. (Exs. G–53, G–54,

G–55, G–56 [p. 1], Tr. 438–442.) The receivers' fees were fixed at $1,000 a month each, and Decker's at $500 a month (Ex. G–56 [p. 2], Tr. 442).

In 1934 Judge Johnson appointed Delmar Townsend, an old acquaintance of the Johnsons, coreceiver at the same compensation as the others (R. 386–389; Ex. G–56, Tr. 442). Prior to the receivership Gilmore had been president of the Williamsport Company at a salary of $40,000 a year plus expenses. Ballard had been vice-president in charge of sales at $25,000 a year plus expenses. Both these men continued to do the same kind of work as receivers as they had previously done as officers of the company. (R. 401–402, 433.) Prior to his appointment as receiver, Townsend had been general manager of a 45-mile-long railroad at a salary of $3,000 a year, which he had been receiving since 1917 (R. 385, 416, 454–455). Townsend continued to hold his job with, and draw his salary from, the railroad throughout the more than three years of his term as receiver (R. 398, 455). Following Townsend's appointment, Miller Johnson asked him to give Albert Johnson, Jr. 50% of his fees in order to help Albert, Jr. and Donald Johnson pay "some obligations" they had. Townsend agreed to do so, and for the remaining three years of his term as receiver gave Albert Jr. half of his fees, less his tax thereon. (R. 391–398, 426.)

In 1935 Judge Johnson appointed Memolo co-counsel to the receivers at $500 a month on account, the same amount Decker, the original counsel, was receiving. The order of appointment stated that it was issued "after consultation with the Receivers and their Counsel and with their approval." (Ex. G–60, Tr. 446, 1527–1528.) Townsend testified that he had no knowledge that Judge Johnson contemplated appointing another attorney until he received the order (R. 390–391). Townsend also testified that prior to Memolo's appointment the receivers would confer with Decker whenever they needed legal advice, but that such need did not arise especially frequently (R. 391). Following Memolo's appointment Judge Johnson told the receivers and Decker that the reason why he had appointed a second attorney was that he had not been able to get desired information from Decker, but Decker protested that he recalled no such occasion. The receivers "knew nothing about that," according to Townsend. (R. 442–443.)

In August 1935 Judge Johnson increased the compensations of the attorneys to $1,000 a month (Ex. G–61, Tr. 447). Townsend first learned of the increases when the order was issued (R. 399–400). Gilmore and Ballard were dissatisfied on learning that their counsel were to receive the same compensation as they (R. 429). Townsend, therefore, told Judge Johnson that in his opinion Gilmore and Ballard, who were devoting their

entire time to the receivership, should receive more than the attorneys, but that he himself wanted no increase, as he was entirely satisfied with the amount he was getting. Judge Johnson agreed with Townsend, except that he said he would not increase the fees of "just two of the receivers." (R. 400–401.) Accordingly, in September 1935, the compensations of all three receivers were raised to $1,500 a month on account (Ex. G–62, Tr. 448.) Townsend's 50% contributions to Albert Johnson, Jr. thereafter reflected his increase (R. 403).

From the beginning the receivership was extremely successful, and Judge Johnson on numerous occasions so stated (Ex. G–56, Tr. 442; Ex. G–62, Tr. 448; Ex. G–63, Tr. 449, 1552–1553; R. 405–406; Tr. 1609–1618). At a hearing on the conduct of the receivership in January 1936 receiver Gilmore traced the steady and substantial increases in gross sales, net profits, and cash accumulations. He stated that the demand for wire rope was increasing and that the company had a greater accumulation of unfilled orders than at any time since 1930. He further stated that, based on past experience and anticipated sales, the entire indebtedness of the company, including all unpaid interest on its outstanding bonds, and excluding only the principal, could be "wiped out" and the company restored to its stockholders within two years. (Tr. 1609–1618.) On several occasions, also, Judge Johnson stated that the

stockholders had a clear equity in the company and that any plan of reorganization which did not take this equity into account would be unacceptable (Ex. G–59 [p. 2], Tr. 445, 2241; Tr. 1663–1665).

The principal creditor of the Williamsport Company was the Bethlehem Steel Company, which had become such by virtue of having bought up most of its outstanding bonds at 70¢ on the dollar and most of its unsecured obligations at 43¢ on the dollar (Tr. 1660–1661, 2332–2333, 2345). Bethlehem had made an "offer for the whole plant" (Tr. 1660–1661), but Judge Johnson, at the January 1936 hearing said that, since "this Bethlehem offer offers nothing to the preferred stockholders," it should be rejected (Tr. 1663–1665).

Hoyt Moore, senior partner in a New York law firm, was Bethlehem's general counsel (R. 589–590, Tr. 2518–2519), and Harry Mumford, a Scranton attorney, was Bethlehem's local counsel in connection with the Williamsport receivership (R. 467). In the summer of 1936 Memolo asked Mumford if he knew what Bethlehem's "objective" was in respect of the Williamsport Company. At this time, according to Mumford, the affairs of the receivership were "very quiescent." When Mumford told Memolo he did not know, Memolo asked him to arrange an appointment for him with Robert McMath, Bethlehem's financial vice-president, explaining that, "as attorney for

the receivers," he might be able to work out something mutually advantageous. Mumford arranged the appointment. (R. 469–470, 581.) Memolo, however, "got nowheres" with McMath, who was "rather cagey" (R. 471), so he asked Mumford to arrange an appointment for him with Moore, who he thought would be "more frank" in disclosing "what Bethlehem wanted" (R. 473–474). Memolo remarked that the receivership was a "large" one and "could stand quite a lot of money." He also said that "the boys wanted to make a killing." (R. 474.) He mentioned in this connection the sum of "something like" $200,000 (R. 475).

In the fall of 1936, accordingly, Mumford advised Moore that Memolo would like to see him and that he "was talking in * * * large sums of money." Mumford expressed "astonishment" to Moore "at the amount, and what was involved." Moore told Mumford that he, Moore, was the proper person to be astonished, that he "was in the saddle," and that he would like to see Memolo. (R. 476, 961.) A meeting was accordingly arranged and Mumford attended it himself (R. 947). Thereafter Moore, Memolo, and Mumford conferred and worked together "getting papers ready" many times at the Moore firm (R. 949). Mumford never saw any of the Williamsport receivers there, however, nor Decker, the other attorney for the receivers (Tr. 1811–1812). On one occasion Memolo told Mumford that

"Don" was with him in a car, that "Don thought he would get some money" on that occasion, but that he "was going to be disappointed" (R. 478).

On September 14, 1936, Bethlehem instituted foreclosure proceedings against Williamsport (Ex. G–65, Tr. 452–453), and on May 27, 1937, purchased the Williamsport Company at a foreclosure sale (Tr. 2329). During this 8½-month interval extensive foreclosure litigation was conducted [46] and, according to the admissions of Moore, a defense witness, numerous conferences were held between him and Memolo, at which they discussed many questions relating to what Bethlehem's tactics in the foreclosure proceeding should be (Tr. 2532–2533, 2538, 2544–2548, 2554, 2559–2561, 2580–2586, 2588, 2590–2591, 2594–2595).

Also during this 8½-month interval Memolo and Donald Johnson conferred with Judge John-

[46] The receivers resisted Bethlehem's petition to make them parties defendant in the foreclosure proceedings (Ex. G–67, Tr. 454); Judge Johnson granted leave to Bethlehem to join the receivers as parties defendant (Ex. DJ–48, Tr. 2320, 2321–2322); the bill of foreclosure was filed (Ex. G–69, Tr. 456); the receivers filed an answer to the bill (Ex. G–70, Tr. 457); separate answers were filed by certain stockholders (Exs. DJ–53, DJ–54, Tr. 2441, 2443); Bethlehem filed motions to strike portions of the answers (Exs. DJ–55, DJ–56, Tr. 2444); the motions to strike were granted by Judge Johnson (Ex. G–73, Tr. 460); a foreclosure decree was entered (Ex. G–74, Tr. 461–462); a stockholders' petition to modify the foreclosure decree was filed and dismissed (Ex. DJ–60, Tr. 2447; Ex. G–76, Tr. 463); and exceptions to the decree were filed by certain stockholders and dismissed (Ex. DJ–62, Tr. 2448; Ex. G–76, Tr. 463).

son in the latter's chambers on several occasions (R. 156, 158, 159). On one of these occasions Memolo "had the proposed foreclosure decree" with him, and Judge Johnson asked his law clerk, Albert Houck, to "go over" it with Memolo (R. 157). Houck testified that, while there was not "anything unusual about an attorney preparing a decree for a Court's consideration" (R. 197), it was "unusual" for an attorney who represented the defendants in a proceeding to prepare a decree on behalf of the plaintiff (R. 219). On another of these occasions Albert Johnson, Jr. was also present, the conference being a "secret" one (R. 159, 212). Houck heard all the participants at the conference whispering (R. 210–211). From time to time Donald or Albert, Jr. would open the door to Houck's office to see whether he was at his desk and whether he was listening (R. 206–207, 208, 209–210, 260–261). Several times Memolo and Donald asked Houck questions about the *Williamsport* case (R. 159, 211). Donald and Albert, Jr. asked Houck whether the duties of John Taylor, whom Judge Johnson had named as special master to conduct the foreclosure sale, included "distribution of * * * the sale price." Houck said yes and referred them to the decree so providing. (R. 160–161, 212.) Neither Donald nor Albert, Jr. was an attorney of record in the *Williamsport* case (R. 148, 218).

On May 17, 1937, ten days before the sale, Donald Johnson telephoned Houck and instructed him not to file his father's opinion in the *Williamsport* case "until the boss said so" (R. 161).

At the foreclosure sale Bethlehem Steel purchased the Williamsport Company as a going concern for $3,300,000, the only bid made (Tr. 2329). Included among the purchased assets was over $1,000,000 in cash (Tr. 2347–2348). At the time of the sale Bethlehem owned 95% of the outstanding bonds of Williamsport, or approximately $1,200,000 (Tr. 2332–2333), which it had previously bought up at 70¢ on the dollar (Tr. 2345). The face value of these bonds, plus accrued interest, was credited against the purchase price bid (Tr. 2346).

On July 26, 1937, following the sale, Memolo told Houck to tell Judge Johnson to file his final decree confirming the sale immediately in order to "forestall" certain Williamsport stockholders, who were about to petition the circuit court of appeals for a writ of prohibition restraining him from so doing. Memolo "practically told [Houck] what the Court should do," which Houck thought "was carrying it a little too far," so he told Memolo he should take the matter up with Judge Johnson, not with him. (R. 162, 200.) The following morning, July 27, Judge Johnson and Donald both discussed the proposed final decree with Houck. The Judge then called Memolo to

make sure the decree was "all right," and it was filed. No accompanying opinion was handed down at this time, as it was not ready for filing. The opinion was filed subsequently. Judge Johnson's usual procedure was to file his decrees and accompanying opinions simultaneously. This was the first time since Houck had been associated with him that this practice had been varied. (R. 162–164.)

On August 2, 1937, Donald Johnson, Memolo, and Judge Johnson had another "very secret" conference (R. 164, 205, 209) and on August 13 Judge Johnson appointed John Crolly special master and auditor in the case (Ex. G–84, Tr. 472; R. 165–166). Houck pointed out to Judge Johnson that "John Taylor had already been appointed Special Master and that this was apparently a duplication or conflict with the other order." Judge Johnson replied that "it was all right" because "Bethlehem has agreed to pay those expenses and it won't hurt Taylor's fee." (R. 166, 213–214.)

On September 4, 1937, Judge Johnson appointed Martin Memolo, brother of the defendant Memolo (Tr. 2601), "agent of this Court, to supervise and oversee" the Williamsport properties pending appeal from the order confirming the sale (Ex. G–85, Tr. 473).

On July 9, 1938, special master Crolly filed an order appointing Edward Maloney to audit the

accounts of the receivership. It was, however, antedated August 20, 1937. (Ex. G–92, Tr. 479; R. 70, 71.) The "order of John W. Crolly * * * of August 20, 1937" was "confirmed and approved" by Judge Johnson on July 9, 1938 (Ex. G–93, Tr. 480; R. 71).

By the terms of the foreclosure decree, the purchaser was required to pay "all administration expenses" as well as all unpaid compensation of the receivers and their attorneys (Tr. 1766–1769). Whereas the receivers and Decker received from Bethlehem final compensation in the amount of $5,000 each (R. 950), Crolly's final fee was $30,850.01 (Ex. G–119, Tr. 1822), Martin Memolo's was $66,990 (Exs. G–124, G–125, G–126, G–127, G–128, Tr. 1823–1824), Maloney's was $31,075 (Ex. G–118, Tr. 1822), and the defendant Memolo's was $81,084.99 (Exs. G–121, G–122, G–123, Tr. 1822–1823). Crolly's and Maloney's bills for services were delivered to Moore by the defendant Memolo (R. 1035). While the $5,000 checks of the receivers and Decker were delivered to them by Mumford, Bethlehem's local counsel (R. 950), the checks of Crolly, Martin Memolo, and Maloney were sent by Moore to the defendant Memolo (Tr. 2742–2743). Moore admitted telling Memolo that he did not care how much Crolly, Martin Memolo, Maloney, and he billed Bethlehem for so long as the aggregate did not exceed

$250,000 (R. 1032–1033). Moore also instructed Memolo as to what form the bills of Crolly, Martin Memolo, and Maloney should be in (R. 1034–1035). At Moore's request Memolo approved the bills of Crolly, Martin Memolo, and Maloney by writing "O. K. J. M." on slips of paper attached to the bills (R. 1036–1037; Tr. 2628–2630; Exs. DJ–97, DJ–95, DJ–99, Tr. 2634–2635), but Moore did not ask Memolo to "O. K." the final fees of the receivers and Decker (Tr. 2744).

Mumford testified that Moore consulted him concerning the fees of the receivers and Decker, but not concerning anybody else's (R. 949–951). Moore did tell Mumford once, however, that he and Memolo were having difficulty concerning "the method of payment" of "the fees." Memolo "wanted his in cash," but was told that "it couldn't be done that way" because, since Bethlehem "was a corporation," the fee "would have to be paid by check." (R. 951.) Moore further explained to Mumford that he "didn't want to be blackmailed by Mr. Memolo at a later date" (R. 957).

Maloney testified that in June 1938 Memolo told him he would recommend him for the job of auditing the receivership accounts, and that he received the appointment a few days later, in July (R. 63, 68–69). After he worked a few months

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Memolo told him to bill Bethlehem for $31,075 and "to sort of distribute it from, say, dating back to 1937." Maloney did so, "alleging services rendered in 1937," though he had not been appointed until July 1938. He gave the bill to Memolo. (R. 64–66.) Thereafter Memolo called Maloney to tell him his check had arrived. Maloney endorsed it and gave it to Memolo. Memolo asked him how much he would "ordinarily" charge for his work. Maloney said around $900 or $1,000. Memolo gave him $1,200, plus $3,900 to cover his income tax on the whole amount. (R. 66–68, 74.)

[Greenes admitted recommending Memolo to Donald Johnson as "additional counsel" to the receivers after Memolo agreed to "play ball" (R. 1124–1125). Memolo paid Greenes half of his fees for delivery to Donald, sometimes borrowing money in order to make "advances" and using Donald's 50% to pay off the loans (R. 1125–1129, 1154, 1169). Later "Memolo conceived the idea of making a deal with Bethlehem to acquire the entire works." Memolo told Greenes only the broad outlines of the plan, but discussed it in detail with Donald. Greenes' understanding was that Bethlehem was "willing to spend" $150,000 as "fees" for acquiring the Williamsport Company—$25,000 to be paid "on the record" to the three receivers and their two counsel and the balance to go to Memolo "off the record." (R.

1130, 1137, 1140.) Greenes, Donald, and Memolo drove to New York once to "sew this thing up." After Memolo left Moore's office, they went to see Judge Johnson in a New York hotel, where Memolo and Donald conferred with him privately. (R. 1139–1140.) According to the plan as Greenes understood it, the fees of Crolly, Martin Memolo, and Maloney were "to be turned back to" the defendant Memolo (R. 1140–1141, 1149). Martin Memolo received an advance fee of $25,000, following which Greenes went to the defendant Memolo to collect part of it, but was told to "wait until it is all in the pot." Greenes complained to Martin that "John wasn't doing as he agreed to do," but Martin told him that he himself had given $6,000 of the money to Donald, which Donald confirmed (R. 1141–1143). After the "off-the-record" money had been all paid, Memolo "kept stalling," pretending he had not received it (R. 1141, 1147–1150). A year after the case was over, Judge Johnson told Greenes that Memolo "had treated Donald very shabbily" and was a "crook" (R. 1145–1146). Greenes kept dunning Memolo for a long time for his share of the money, but in 1943 despaired of ever receiving it (R. 1150–1152).]

CONTINENTAL CIGAR CORPORATION CASE

This was a reorganization proceeding which arose in 1935. Judge Johnson appointed John Crolly a trustee. (Ex. G–24, Tr. 385–386.)

Thereafter he appointed Memolo counsel to the trustees (Ex. G–26, Tr. 387, 764–765).

[Greenes admitted that Memolo gave him half of his $1,000 fee in this case, and that he delivered it to Donald Johnson, receiving about $50 for himself (R. 1172–1173).]

KORMAN CASE

In May 1935 one Korman and 62 others were indicted for conspiracy to violate the internal revenue laws (Tr. 1097–1099, 1104). When the case was tried in November 1935 before District Judge Welsh, Korman had not yet been apprehended (Tr. 1098). Most of Korman's codefendants pleaded guilty (Tr. 1099), and all except a very few received executed jail sentences (Tr. 1105, 1110). Korman subsequently pleaded guilty before Judge Johnson in May 1936 (Tr. 1100, 1106). Judge Johnson asked Memolo, Korman's attorney, how large a fine Korman could pay, and Memolo said $500 (Tr. 1100–1101). The attorney for the Government objected to the imposition of a fine only and advised Judge Johnson that witnesses were present in court who could prove that Korman furnished the syndicate more distilled spirits than any of the other persons indicted as suppliers. He further told Judge Johnson that Judge Welsh had imposed substantial jail sentences and fines on three persons who were "in the same category as Korman," and urged that Korman should be given a jail sen-

tence not less severe. Judge Johnson sentenced Korman to a fine of $500 and imprisonment for a year and a day, but suspended execution of the prison sentence and placed Korman on probation for five years. (Tr. 1101–1102.)

Phillip Katz, a second cousin of Greenes (R. 123), who had been told many times by Greenes that he could "fix" cases in the federal court in Scranton (see p. 39, *infra*), testified that following a conversation with Korman in New York (R. 124–125, 127), he telephoned Greenes and told him that he had a man who "has got a case up in Scranton" (R. 129–130). Greenes told Katz to "Bring him on" (R. 130).

In October 1937 Korman filed a petition to be released from probation (Ex. G–29, Tr. 391, 1117–1120). Henry Mowles, the probation officer, filed a recommendation that the petition be granted (Ex. G–30, Tr. 392, 1121–1122) and Judge Johnson granted it (Ex. G–31, Tr. 393, 1123). Houck, Judge Johnson's law clerk (R. 146–147), testified that Judge Johnson terminated the probation without consulting the United States Attorney (R. 152, 187–188). Houck further testified that Judge Johnson told Mowles "to report favorably [on Korman's petition] because he was going to terminate the probation anyhow" (R. 153, 192). Houck also testified that Mowles told him, Houck, that Korman "had a penitentiary sentence behind him," which Mowles had reported in his original report, but that he

had omitted reference to Korman's "record" in his final report (R. 192).

[Greenes admitted referring Korman to Memolo and acting as go-between between Memolo and Donald Johnson, who was to see to it that Korman "wouldn't go to jail." Greenes delivered half of Memolo's fee of $2,500 to Donald, receiving about $100 for himself. (R. 1174–1175.) Greenes also admitted acting as go-between between Memolo and Donald when Korman's probation was terminated. Korman gave Greenes $1,000 or $1,200 on this occasion, and Greenes delivered it to Donald, receiving a "hundred or two" for himself. (R. 1178–1180.)]

DERVAS TOBACCO COMPANY CASE

In August 1937 a petition for reorganization of the Dervas Tobacco Company under the bankruptcy laws was filed (Ex. G–32, Tr. 396). The petition was prepared by Frank Butler, counsel for the company, who testified that he explained to Judge Johnson that the petition was in the usual form except that he was requesting that the company be allowed to remain in possession and operate the business as a going concern (Tr. 767, 769). Judge Johnson ordered that the company be allowed to continue in operation and possession, subject to the supervision of the court (Tr. 782). On October 20, 1937, Judge Johnson entered an order reciting that "after hearing in open court" it was decreed that David Schwartz be appointed trustee to operate the business (Ex.

G–33, Tr. 397, 771–772). Butler testified that he first learned of this order when it was filed (Tr. 770) and that he "wasn't present at any hearing" (Tr. 773). On December 21, 1937, Schwartz petitioned for allowance of a $2,500 fee for his services, which Judge Johnson granted (Ex. G–34, Tr. 397–398, 773–779). Butler testified that he was unaware either of this petition or the order granting it until after entry of the order (Tr. 780); that he and the special master complained to Judge Johnson that the fee was excessive for only two months' work; and that Judge Johnson accordingly reduced the fee to $1,250 (Tr. 779, 789–790, 806). Thereafter Butler implored Judge Johnson to further reduce the fee to $500, pointing out that the company's purpose in requesting leave to remain in possession and operation was to minimize expenses, that Schwartz' appointment was "without any notice" to the company, that no party in interest sought the appointment of a trustee, and that the $1,250 fee was "excessive, exorbitant and entirely disproportionate" to the value of Schwartz' services, would make reorganization impossible, and compel liquidation, in which event the trustee's fee would be only about $100 under Bankruptcy Act regulations (Ex. G–35, Tr. 399; 781–785). Judge Johnson, however, refused further to reduce the fee (Ex. G–36, Tr. 400, 788). Schwartz "finally settled for $1,000," which he "was satisfied to take," and which the company paid to get "rid of it" (Tr. 790–791).

[Greenes admitted conveying to Donald Johnson Memolo's desire that Schwartz be appointed in this case and delivering half of Schwartz' $1,000 fee to Donald, receiving $25 to $50 for himself (R. 1163–1164, 1168).]

WILKES-BARRE & EASTERN RAILROAD COMPANY CASE

This was a reorganization proceeding which arose in 1937 (Ex. G–37, Tr. 402). Judge Johnson appointed Joseph Jennings trustee (Ex. G–38, Tr. 403), and David Schwartz as his counsel (Ex. G–40, Tr. 405). Jennings' salary was $5,000 a year, and Schwartz' was $4,000 (Ex. G–39, Tr. 404).

[Greenes admitted recommending Jennings, at Memolo's suggestion, to Donald Johnson as a good appointment in this case, explaining that he would "play ball." Memolo was practically making all appointments by this time, since Donald accepted his recommendations without question. (R. 1181–1182.) Greenes gave part of Jennings' fees to Donald (R. 1183–1184). Each month Greenes also gave Donald $233 of Schwartz' monthly fees of $333, receiving "the $33" for himself (R. 1193–1195). The "last money" Greenes gave Donald of Jennings' fees was $350, which he received in 1942. Since Donald was out of town, he instructed Greenes to send the money to him by check. Greenes, accordingly, asked his brother Abe to draw a $350 check to Donald's order and sent it to Donald. In 1944, after the "investiga-

tion" started, Jacob Greenes "felt disturbed" about this check because he had thereby involved his innocent brother in the transaction. He accordingly arranged with Donald that Donald "was to say" that the $350 was in payment of a legal fee for having procured for Abe a hotel cigar-stand concession he operated. (R. 1184–1188.)]

GIANT DRY GOODS COMPANY CASE

This was a bankruptcy case that arose in 1940 (Ex. G–43, Tr. 1061). Judge Johnson appointed David Schwartz as receiver (Ex. G–44, Tr. 1061–1062, 1064–1065). He also appointed one Levy and others to appraise the bankrupt's assets (Ex. G–45, Tr. 1062, 1068).

Levy, a dry goods dealer and an uncle of Greenes, testified that he asked Donald Johnson to remember him "if he shall have a chance as an appointment for appraiser" (R. 109–111). He had never before served as an appraiser or in any other capacity in this court (R. 112). Following his appointment he received a $330 fee (R. 113). On the day he received it Greenes demanded and received $200 of it (R. 113–115).

[Greenes admitted giving Donald Johnson 50% of Schwartz' fees in this case (R. 1169–1172). He also knew that Donald had arranged for Levy's appointment, and admitted demanding $200 of his fee, but he could not recall whether he gave Donald any of it or kept it all himself (R. 1171–1172).]

CENTRAL FORGING COMPANY CASE [5]

This was a reorganization proceeding which arose in 1938 (Ex. G–47, Tr. 415). In December 1941 Judge Johnson appointed Robert Michael successor trustee (Ex. G–48, Tr. 418) and the following month appointed Donald Reifsnyder as his counsel (Ex. G–49, Tr. 419). On July 9, 1943, Michael filed his first and final account as successor trustee (Ex. DJ–12, Tr. 2162).

Michael testified that in 1941 Donald Johnson told him that there was to be a vacancy in the trusteeship in this proceeding and suggested that he ask Judge Johnson to be appointed successor trustee. Michael did so and received the appointment. Michael asked Donald Johnson whom he should have as his counsel. Johnson suggested Reifsnyder, and the latter was appointed. (R. 235–238.)

Michael further testified that he and Reifsnyder negotiated with Harry Knight, George Fenner, and Homer Davis, all of whom had interests in the Maxi Manufacturing Company, concerning a proposed merger whereby that company would take over the assets of the Central Forging

[5] The jury were instructed not to consider, as against petitioner Johnson, certain of the evidence adduced in respect of this particular proceeding. The reason for the instruction and the nature of the evidence to which it pertained are explained in note 6, *infra*, p. 32. The entire evidence relating to this proceeding, however, except as indicated in notes 7 and 8, *infra*, p. 33, was received unqualifiedly as against all other defendants, and may therefore be considered in its entirety as further evidence of the conspiracy charged.

Company, and that such a plan of reorganization was eventually agreed upon (R. 239–244, 285). Reifsnyder told Michael that they would have to "figure out some way to take care of Donald [Johnson]." Michael at first objected to this on the ground that he did not owe Johnson anything, but Reifsnyder explained that "it's understood. It's always done." (R. 245–247.) A plan was accordingly worked out whereby the accounts receivable of the Central Forging Company, which were among the assets that the Maxi Company was to take over, would be evaluated at $20,000 instead of at their true value of $23,000, the $3,000 difference to go to Fenner as alleged payment for legal services, with the understanding that Fenner would retain $500 with which to pay his income tax on the $3,000 and give the balance to Michael and Reifsnyder for delivery to Johnson (R. 246, 249–251, 254). Michael asked Johnson whether he understood the plan and whether it was agreeable to him. Johnson said he understood and approved. (R. 247.) The proposed plan of reorganization was approved by Judge Johnson (Ex. DJ–13, Tr. 2157–2161).

Michael further testified that on April 24, 1942, he and Reifsnyder met with Knight, Fenner, and Davis in Knight's office, and the plan of reorganization was executed by the issuance of deeds, checks, and other papers (R. 251–252). Among the checks issued was one for $3,000 payable to Fenner (R. 252). The parties then went to the

Catawissa National Bank, where the cashier cashed Fenner's check (R. 252–253). The proceeds consisted of six bundles of $20 bills, $500 in each bundle, and each enclosed in a wrapper on which the name of the bank and the amount contained therein appeared. Fenner took one of the bundles, and Michael and Reifsnyder, the other five. (R. 253–255, 281.) Reifsnyder gave this $2,500 to Johnson on April 25 or 26. Johnson argued that he should get a third of that plus a third of Michael's and Reifsnyder's combined fees of $7,900, but Michael insistently opposed this proposal and finally prevailed in his contention that all Johnson should get was the $2,500. (R. 257–258, 265, 272–275.)[6]

[6] In April 1945 Donald Johnson, Michael, Davis, Fenner, and Knight were indicted for feloniously appropriating (count 1) and transferring (count 2) $3,000 of the Central Forging Company's bankrupt estate and for conspiracy to do so (count 3). Reifsnyder was named as a confederate and co-conspirator. (Ex. DJ–1, R. 537–546.) Seven overt acts were alleged in the conspiracy count (R. 544–546). The incidents involved in five of these overt acts were among those testified to by Michael at the instant trial. They were (1) the meeting of Knight, Michael, Fenner, Davis, and Reifsnyder in Knight's office on April 24, 1942 (overt act 1), (2) the cashing of the $3,000 Fenner check on the same day (overt act 3), (3) Fenner's receipt of $500 (overt act 6), (4) Donald Johnson's receipt of $2,500 (overt act 7), and (5) Michael's filing of his first and final account as successor trustee on July 9, 1943 (overt act 5). In November 1945 Donald Johnson was acquitted on all three counts (R. 558–559), and the verdict of acquittal was received in evidence at the instant trial (Ex. DJ–26, R. 558). In his charge to the jury in the instant case, the trial judge pointed out that, while "the charge in that [*Central Forging*] case and the charge in this case" were

Michael further testified that two years later, in May 1944, Donald and Miller Johnson told him that they were being investigated by the F. B. I. and asked him whether he was being investigated, to which Michael replied in the negative (R. 279);[7] and that between July 8 and August 24, 1944, Donald Johnson again asked him whether he was being investigated, to which Michael replied in the affirmative (R. 276–277).[8]

Michael finally testified that on August 24, 1944, he repeatedly committed perjury before the grand jury which subsequently indicted him and others for abstracting $3,000 from the estate of the Central Forging Company and conspiring to do so (see note 6, *supra*, p. 32) by denying Donald Johnson's participation in any way in that case; that he did so in order to protect Johnson; and that he adhered to his false testimony until after he pleaded guilty to the indictment in that case on June 19, 1945 (R. 340, 343–345, 348–358).

Eva Smith, Judge Johnson's secretary from 1926 to 1942 (R. 498, Tr. 1844), testified that on

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different, "some of the facts or incidents" in the two cases were the same (R. 888), and instructed them that, in order to make certain that Donald Johnson would not be tried a second time "on the same set of facts," they should "not retry as to Donald Johnson the charges in the [*Central Forging*] indictment" and should not consider as against him in this case any of the incidents described in the five overt acts, above referred to, alleged in the *Central Forging* indictment (R. 888–889).

[7] This testimony was admitted only as against Donald and Miller Johnson (R. 278).

[8] This testimony was admitted only as against Donald Johnson (R. 278).

May 1, 1942, Donald Johnson visited Judge Johnson, and that on the following day she found $500 in the latter's wallet in one of his bureau drawers while straightening them up at his direction. It was "a package of [$20] bills with the wrapper stamped on it, 'The Catawissa National Bank' and in figures '$500.' " (R. 500–501, 505.) Mrs. Smith, who was very familiar with the sources of Judge Johnson's income, "known" and otherwise (*infra,* pp. 36–37), further testified that Judge Johnson had no account in the Catawissa National Bank, and that this $500 was not "from any of his known sources of income" (R. 502).

The cashier of the Catawissa bank testified that neither Judge Johnson nor any member of the Johnson family had ever had an account there (R. 370).

KOPPELMAN CASE

In January 1943 one Koppelman was charged in four counts of an indictment with embezzling Army cloth (Ex. G–50, Tr. 423). Koppelman's attorney was David Schwartz (Ex. G–51, Tr. 424). Following a jury trial Koppelman was found guilty. On July 29, 1943, Koppelman appeared for sentencing. Judge Johnson made some remarks to the effect that the Government had recovered its cloth, and further stated that he did not intend to take into consideration the fact that Koppelman was then on probation in connection with a prior offense. He then fined

Koppelman $1000 on the first count, suspended the imposition of sentence on the other three counts, and placed him on probation for a year. (Ex. G–52, Tr. 425.)

[Greenes admitted acting as go-between between Schwartz and Donald Johnson in this case. Schwartz paid Donald $15,000 and told him he "expected a directed verdict." When Koppelman was convicted and "it seemed as though the commitment hadn't been carried out," Schwartz and Greenes drove to the Johnsons' summer home and conferred with Judge Johnson and Donald. Donald told his father that Koppelman "never should have been convicted," and that in his opinion a fine would be sufficient punishment, with which Schwartz agreed. Schwartz "was satisfied with the outcome" and paid Greenes for his "help in the matter." (R. 1202–1209.)]

KIZIS CASE

In October 1943 one Kizis was indicted for misapplying bank funds which had come into his custody as cashier (Ex. G–96, Tr. 483).

[Greenes admitted that Memolo, Kizis' attorney, asked him to contact Donald Johnson for help in this case. Donald agreed to "handle it," i. e., see to it that Kizis "wouldn't go to jail," for $15,000. This was agreeable to Memolo. Donald, however, wanted Memolo to put up the money in advance, which Memolo refused to do.

Donald, accordingly, refused to "have anything to do with it." Greenes later learned that Kizis was convicted and sent to jail. (R. 1198–1201.)]

ADDITIONAL EVIDENCE

In addition to the evidence directly relating to particular court proceedings as set forth above, the Government adduced the following evidence tending to show the existence of the conspiracy charged and the participation of petitioners and of Judge Johnson and Memolo in it:

Judge Johnson's "unknown" sources of income and Donald Johnson's connection therewith.—Eva Smith, Judge Johnson's secretary from 1926 to 1942 (R. 498, Tr. 1844), testified that two-thirds of her time was devoted to looking after Judge Johnson's personal affairs, including the handling of all his records relating to his income and expenses, and that she knew all the "known sources" of his income (Tr. 1842–1845). She further testified that Judge Johnson received money in addition to that received from his "known sources" of income and that his receipt of such money, so far as she was aware, began in 1936 (Tr. 1845–1846). In "the beginning" he would give her such additional money in cash to deposit and tell her to "mark" it "a repaid loan," "real estate," or "court expenses." Later he used to spend the money and give her the receipted bills to place in an inventory. (Tr. 1847–1848.) She began to notice, she testified, that "whenever the Judge was in possession of

money" it was always just after a visit from Donald Johnson (R. 498). In 1939, at Judge Johnson's request, she prepared a statement (Ex. G–129, Tr. 1855) showing all the money he had received from sources other than his "known sources" of income (R. 498–500). The moneys listed were falsely attributed to sales of real estate and to "court expenses" (Tr. 1851–1852, 1856, 1857). She and Judge Johnson discussed the various items "as to their correctness" (R. 500, Tr. 1853–1854). Judge Johnson also showed the statement to his son Miller in her presence, explaining that "there was a rumor of an investigation," that "we would have to account in some way for this money," and that "we are not going to be caught with our pants down" (R. 500).

The connection between Memolo and Judge Johnson's orders.—Houck, Judge Johnson's law clerk, testified that several of the orders signed by Judge Johnson were on "blue backers" of Memolo (R. 166–167).

Donald Johnson's interest in cases in which he was not an attorney of record.—Houck further testified that he used to see Donald Johnson about the court and visiting his father, and that his visits "became more frequent as time went on" (R. 147–148). He further testified that he recalled Donald "frequently asking questions about cases that were pending in Court" in which he was not an attorney of record (R. 148–149).

The $350 check sent by Greenes to Donald Johnson.—Abe Greenes, a brother of petitioner Jacob Greenes, testified that he once operated a hotel cigar stand (R. 224). In 1942 Jacob asked Abe to write a $350 check to the order of Donald Johnson. Abe did so, and gave the check to Jacob for cash. Jacob did not explain why he wanted Abe to write the check. (R. 225–227.) In 1944 Abe and Jacob decided on "a story to tell" about this check. According to the "story," the check was in payment of a fee owed by Abe to Donald for his having procured Abe's cigar-stand concession. (R. 228–229.)

An employee of a Swineford, Pennsylvania, bank testified that according to his bank's records Donald Johnson, on October 7, 1942, deposited a $350 check drawn by Abe Greenes to Johnson's order (R. 712–717).

Donald Johnson, the only defendant on trial to take the witness stand, admitted receiving the $350 check from Abe Greenes, but testified that the check was in payment for legal services (R. 683–684). He testified that he recorded this payment in his cash book (R. 683–684, 698–699), which was received in evidence (Ex. DJ–119, Tr. 2935). All the entries in this book for October 1942 were on separate lines except one, in the amount of $350, which was wedged in between two other entries (R. 708–709, 737–738).

F. B. I. agent Sowell testified that he examined Johnson's cash book in April 1944 and that the

October 1942 entry of $350 was not in the book at that time (R. 737–738). Sowell further testified that the total of the October 1942 entries had been increased by $350 from $600.06 to $950.06 between the time he examined the book in 1944 and the trial, the latter figure having been "written over" the former (R. 740–741).

Greenes' claim that he could "fix" cases in the federal court in Scranton.—Phillip Katz testified that on many occasions Greenes told him that if he ever heard of "anybody that has any case up in Scranton" he should refer such person to him, Greenes (R. 132, 134), who would "take care of him" (R. 133). Greenes particularly mentioned "The Federal Court" as a court in which he could get cases "fixed" (R. 138).

Greenes' associations with Donald Johnson.—William Beacham, whose employer shared an office suite with Donald Johnson in Scranton, testified that from 1934 to 1941 petitioner Greenes was a "frequent visitor" of Donald in the latter's office, the visits occurring sometimes "several times in one week" (R. 462–464). Beatrice Moran, Donald Johnson's secretary, testified that Greenes visited Donald approximately once a week from 1939 to 1941; that Greenes was not a client of Donald; and that on two or three occasions, when Donald was not in his office, Greenes left an envelope with her with a message for Donald (R. 493–496).

Greenes' associations with Judge Johnson and Donald Johnson—David Martin, Judge Johnson's bailiff from 1934 to 1941 (R. 516), testified that on half a dozen occasions around 1939 or 1940 he observed Greenes and Donald Johnson entering Judge Johnson's chambers together when Judge Johnson was there (R. 519–520, 522–523).

Greenes' associations with Memolo.—Beatrice Tighe, Memolo's secretary from 1933 to 1936, testified that Greenes, though not a client of Memolo, visited the latter's office from two to eleven times a week; and that on three to five occasions she drew checks on Memolo's account at his direction, cashed them, and delivered the money to Greenes on the street or in the hallway of the building (R. 996–999).

ARGUMENT

1. Petitioner Johnson contends that the Government failed to prove a general, over-all conspiracy to obstruct justice as charged; that the most that was proved was a number of separate, disconnected conspiracies having no common figure other than Judge Johnson, who, by his acquittal, was "removed * * * as an alleged conspirator"; that there was no proof that he, petitioner Johnson, had any connection with eight of these conspiracies; and that therefore, under the rule of *Kotteakos* v. *United States,* 328 U. S. 750, it was error to try him jointly with the other alleged conspirators (Pet. 20–30). The contention is without merit, for the Government did

prove a general conspiracy as charged and further proved that petitioner Johnson was one of its key members, the others including at least Judge Johnson, Memolo, and Greenes.

(a) *The effect of Judge Johnson's acquittal on appellate review of the sufficiency of the evidence as to his convicted co-defendants.*—At the outset it is necessary to point out that petitioner Johnson is in error in assuming that the acquittal of Judge Johnson "removed him as an alleged conspirator, and the key figure" (Pet. 20–21). The evidence adduced, which we shall review, showed that Judge Johnson was, in the language of the trial judge (R. 822), the "heart and core" of the conspiracy alleged. The jury's acquittal of him and conviction of others, therefore, constituted "a rational inconsistency between the verdicts" (*United States* v. *Austin-Bagley Corporation,* 31 F. 2d 229, 233 (C. C. A. 2), certiorari denied, 279 U. S. 863). It is well settled, however, that the acquittal of an alleged member of a conspiracy is no bar to the conviction of other alleged members, even though under the Government's theory the person acquitted was a key member of the conspiracy; and by the same token, on appellate review of the sufficiency of the evidence to sustain conspiracy convictions, the reviewing court is not precluded from considering the evidence adduced against an alleged key coconspirator who was acquitted, to the extent necessary in determining the adequacy of the evidence adduced against his

convicted fellows. *United States* v. *Hare,* 153 F. 2d 816, 818–819 (C. C. A. 7), certiorari denied, 328 U. S. 836; *Joyce* v. *United States,* 153 F. 2d 364, 367–368 (C. C. A. 8), certiorari denied, 328 U. S. 860; *United States* v. *Fox,* 130 F. 2d 56, 57 (C. C. A. 3), certiorari denied, 317 U. S. 666; *Baxter* v. *United States,* 45 F. 2d 487, 488–489 (C. C. A. 6); *United States* v. *Austin-Bagley Corporation,* 31 F. 2d 229, 233 (C. C. A. 2), certiorari denied, 279 U. S. 863; *Belvin* v. *United States,* 12 F. 2d 548, 551 (C. C. A. 4), certiorari denied, 273 U. S. 706. It is proper, therefore, for the purpose of showing that a general conspiracy was proved as charged and that petitioner Johnson was one of its members, to review the evidence tending to prove the corruptness of Judge Johnson's judicial acts and his participation in the alleged conspiracy.

(b) *The corruptness of Judge Johnson's judicial acts and his participation in the conspiracy.*— The corruptness of Judge Johnson's judicial acts and his participation in the alleged conspiracy were proved by six principal types of evidence. These were the questionable character of the acts themselves; the corrupt transfers of money, usually in the nature of "kick-backs," which followed them; Judge Johnson's proved receipt of part of such corrupt money in the *Central Forging Company* case; his receipt of money from "unknown" sources of income; his secret conferences, unexplainable under any hypothesis of innocence, with Memolo and Donald Johnson in

the *Williamsport* case; and finally his admissions against interest. Following is a brief resume of such evidence:

MOUNT JESSUP COAL COMPANY CASE

(1) *Judge Johnson's reversal of Kilcullen's second report and reinstatement of the latter's original finding.*—Judge Johnson had five months earlier ordered Kilcullen to reconsider his original finding. Following the reversal and the payment of the Winton tax claim, Memolo, the attorney for the Winton collector, retained exactly half of the recovery for "Expenses," his attorney's fee and ordinary expenses being over and above this. (*Supra,* pp. 7–8.) While Judge Johnson's actions here were *per se,* perhaps, merely suspicious, the inference of corruption is justified when they are viewed, as they must be, in the setting of the evidence as a whole against him.

PENNSYLVANIA CENTRAL BREWING COMPANY CASE

(2) *Judge Johnson's orders directing the payment of $2,500 and $2,473 to Maloney.*—Maloney had agreed to go "fifty-fifty" with Greenes if the latter got him the appointment as auditor. Both of Maloney's petitions for fees were prepared for him by Memolo. Maloney gave Greenes half of both fees pursuant to their arrangement. Maloney worked only three months and his services were admittedly worth less than a third of the amount Memolo had him charge. (*Supra,* pp. 9–10.)

(3) *Judge Johnson's appointment of Townsend as third receiver.*—Whereas the other receivers were experienced wire rope men who had drawn very substantial salaries as officers of the company before the receivership, Townsend had previously been a $3,000-a-year manager of a 45-mile-long railroad. Yet he was appointed co-receiver at the same compensation—$1,000 a month—as the others. His only qualification for this position would appear to have been his long-standing acquaintance with the Johnsons. He continued his railroad work and received his railroad salary throughout the more than three years of his receivership duties. Shortly after his appointment, Townsend agreed with Miller Johnson to pay Albert Johnson, Jr. 50% of his fees in order to help Albert, Jr. and Donald Johnson pay "some obligations." Townsend made these corrupt payments throughout his term as receiver. (*Supra*, p. 11.)

(4) *Judge Johnson's appointment of Memolo as co-counsel to the receivers.*—Though the order of appointment stated that it was made after consultation with the receivers and with their approval, receiver Townsend testified that he had no idea Judge Johnson was contemplating such a move, and also that he knew of no particular need for a second attorney. Judge Johnson later tried to explain why he had named a second attorney, but

Decker, the original attorney, contradicted him in this respect. (*Supra*, p. 12.) The corruptness of the appointment of Memolo is further evidenced by the very identity of the appointee, in view of the utter corruptness of his activities reflected throughout the record.

(5) *Judge Johnson's orders increasing the compensations of counsel to the receivers and later of the receivers themselves.*—The motive for increasing Memolo's compensation was inferably corrupt for the same reasons that the good faith of his appointment was suspect. The motive for the insistence that Townsend's compensation be increased along with that of the other receivers, notwithstanding Townsend's candid statement that he was not entitled to an increase, must be judged in the light of the fact that half of Townsend's fees were going regularly each month to Albert, Jr. and Donald, pursuant to his arrangement with Miller. (*Supra*, pp. 12–13.)

(6) *Judge Johnson's conspiracy with Memolo, Moore, and Donald Johnson to permit Bethlehem Steel to foreclose its mortgage for the corrupt consideration of $225,000.*—The Williamsport receivership was extremely successful and there was every indication that the company could be restored to its stockholders within a reasonable time. Judge Johnson himself insisted that the stockholders had a clear equity, which any plan of reorganization would

have to take into account. His change of attitude in this respect and the beginning of the proceedings which were to culminate in Bethlehem's acquisition of the company at foreclosure for an amount far less than its true value were roughly contemporaneous with Memolo's corrupt overtures to Mumford, McMath, and finally to Moore. Memolo's corrupt dealings with Moore and his secret conferences with Judge Johnson and Donald Johnson during the foreclosure proceedings point inescapably to a conspiracy to "sell out" Williamsport to Bethlehem. The haste with which the final decree confirming the sale was filed is further evidence of this conspiracy. The evidence showed overwhelmingly that the "fees" of Memolo, Crolly, Martin Memolo, and Maloney were nothing more than an elaborate device for the payment of the corrupt consideration of approximately $225,000. (*Supra,* pp. 13–22.)

CONTINENTAL CIGAR CORPORATION CASE

(7) *Judge Johnson's appointment of Crolly as a trustee and of Memolo as counsel to the trustees* (*supra,* pp. 23–24).—While there is no evidence (admissible against Judge Johnson) specifically pointing to anything corrupt in respect of these appointments, their *bona fides* must be appraised in the light of Crolly's proved complicity in the *Williamsport* conspiracy (*supra,* pp. 19–21) and of the thoroughly corrupt activities of Memolo reflected throughout the record.

(8) *Judge Johnson's suspension of Korman's prison sentence.*—Katz, who had been told many times by Greenes that he could "fix" cases in the federal court in Scranton, told Greenes about Korman's pending case, and Greenes told Katz to "Bring him on." Though the government attorney told Judge Johnson that he had witnesses who could prove that Korman was a major figure in the case and urged that he should receive a substantial jail sentence, Judge Johnson nevertheless merely fined Korman. He did, it is true, also sentence him to a year in prison, but this was obviously only "for the record," since he promptly suspended its execution. The corruptness of the sentence is further evidenced by the fact that Korman's attorney was Memolo. (*Supra,* pp. 24–25.)

(9) *Judge Johnson's release of Korman from probation.*—This action was taken without even consultation with the United States Attorney. Mowles, the probation officer, was told by Judge Johnson to "report favorably" on Korman's petition since he "was going to terminate the probation anyhow." Korman "had a penitentiary sentence behind him," which Mowles had reported in his original report, but which he omitted from his final report. The omission was obviously due to Judge Johnson's instruction. (*Supra,* pp. 25–26.)

(10) *Judge Johnson's appointment of Schwartz as trustee.*—The debtor company had requested leave to continue in operation and possession of its business as an economy measure, which Judge Johnson permitted for a while. His sudden order appointing Schwartz recited that it was made "after hearing in open court," but Butler, the company's attorney, testified that he knew of no such hearing. (*Supra,* p. 27.)

(11) *Judge Johnson's allowance of Schwartz' fee.*—The original allowance was $2,500 for only two months' work, which Butler protested was entirely unnecessary. When both Butler and the special master protested the excessiveness of this fee, Judge Johnson reduced it to $1,250. Butler besought Judge Johnson further to reduce it to $500, pathetically outlining all the reasons why even $1,250 was entirely out of line and would make reorganization impossible, but Judge Johnson summarily refused his request. Schwartz eventually "settled for $1,000," which he was glad to get, and which the company paid to get "rid of it." (*Supra,* p. 27.)

WILKES-BARRE & EASTERN RAILROAD COMPANY CASE

(12) *Judge Johnson's appointment of Schwartz as counsel to the trustee* (*supra,* p. 28).—While there is no evidence (admissible against Judge Johnson) specifically pointing to corruptness in respect of this

appointment, it is fair to recall, in judging its *bona fides,* that Schwartz was the trustee involved in the corrupt appointment in the *Dervas Tobacco Company* case (*supra,* p. 48) as well as the attorney for the embezzler Koppelman, who received from Judge Johnson a sentence that was unexplainably lenient under any hypothesis of good faith (*infra,* p. 51).

GIANT DRY GOODS COMPANY CASE

(13) *Judge Johnson's appointment of Levy as appraiser.*—Levy had asked Donald Johnson to "remember" him if he should ever "have a chance as an appointment for appraiser." In due time, Levy received such an appointment from Judge Johnson in this proceeding, though he had never acted in a similar capacity before. On the very day Levy received his fee of $330, Greenes came around to demand a $200 "kick-back." (*Supra,* p. 29.)

CENTRAL FORGING COMPANY CASE

(14) *Judge Johnson's appointment of Michael as successor trustee and of Reifsnyder as his attorney.*—Michael applied for this appointment at the suggestion of Donald Johnson, who informed him that there was to be a vacancy in the trusteeship. Donald also suggested Reifsnyder as Michael's attorney. (*Supra,* pp. 30–31.) In view of the subsequent events in this proceeding, the corruptness of these appointments is obviously inferable.

(15) *Judge Johnson's approval of the proposed plan of reorganization.*—Under the plan, the Maxi Company was to pay only $20,000 for Central Forging Company assets worth $23,000, the $3,000 difference to go to Fenner as alleged payment for "legal services," with the understanding that he would retain $500 with which to pay his income tax for the purpose of "taking care of" Donald Johnson (*supra,* pp. 31–34). That Judge Johnson must have known of this corrupt deal is evidenced by the fact that he himself received at least $500 of this "pay-off" money.

(16) *Judge Johnson's receipt of $500 of the corrupt $2,500 paid to Donald Johnson.*—The $2,500 with which Michael and Reifsnyder "took care of" Donald Johnson was delivered to him on April 25 or 26, 1942 (*supra,* p. 32). Judge Johnson's secretary testified that on May 1 Donald visited his father and that on the following day she found $500 in $20 bills enclosed in a wrapper bearing the name "Catawissa National Bank" and the amount, "$500," in Judge Johnson's wallet in one of his bureau drawers. This description of the money corresponded exactly with the description of each of the bundles of money received in exchange for the $3,000 Fenner check, $2,500 of which was paid to Donald Johnson. (*Supra,* pp. 32–34.)

KOPPELMAN CASE

(17) *Koppelman's sentence.*—While the United States was fighting a war of sur-

vival, Koppelman was found guilty on four counts of embezzling Army cloth. He was on probation at the time, moreover, in connection with a prior offense. Instead of sending Koppelman to jail, where he belonged, Judge Johnson imposed a light fine on one count and suspended imposition of sentence on the other three counts, for the alleged reason that the embezzled cloth had been recovered. (*Supra,* pp. 34–35.) When it is recalled that Koppelman's attorney was Schwartz, the trustee involved in the *Dervas Tobacco Company* case (*supra,* p. 48), and when the action is viewed in the light of the evidence as a whole against Judge Johnson, the only reasonable conclusion that can be drawn is that Koppelman's lenient sentence was bought and paid for.

THE "ADDITIONAL EVIDENCE"

(18) *Judge Johnson's receipt of money from "unknown" sources of income.*—The receipt by Judge Johnson of money from "unknown" sources of income (*supra,* pp. 36–37) is further obvious proof of the corruptness of his judicial acts.

(19) *Judge Johnson's admissions in regard to his money from "unknown" sources.*—Eva Smith testified concerning her preparation, at Judge Johnson's direction, of a statement showing all the money received by him from his "unknown" sources of income, the statement attributing the money to false sources. She further testified that Judge Johnson explained

to Miller that the reasons why he had caused the statement to be drawn up were that "there was a rumor of an investigation being made," that "We would have to account in some way for this money," and that "We are not going to be caught with our pants down." (*Supra*, pp. 36–37.)

(c) *The unitary character of the conspiracy and Donald Johnson's membership in it.*—From the evidence so far reviewed (under (b), *supra*), it is evident that the Government proved that Judge Johnson entered into corrupt transactions with one or more persons in each of ten [9] separate court proceedings. Memolo was proved to have been implicated in five of these corrupt arrangements (the *Mount Jessup Coal Company, Pennsylvania Central Brewing Company, Williamsport Wire Rope Company, Continental Cigar Corporation,* and *Korman* cases), Greenes in three (the *Pennsylvania Central Brewing Company, Korman,* and *Giant Dry Goods Company* cases), and Donald Johnson in three (the *Williamsport Wire Rope Company, Giant Dry Goods Company,* and *Central Forging Company* cases). We think that even if there were no other evidence this would suffice to show that at least these four defendants were members of a general conspiracy to sell justice and judicial favors whenever the oppor-

[9] There was no generally admissible evidence of corruptness in the *Kizis* case, the evidence in that proceeding being limited to petitioner Greenes (*supra*, pp. 35–36).

tunity arose, and that therefore their inclusion as codefendants in a single conspiracy indictment was proper under the rule of the *Kotteakos* case, 328 U. S. 750. See also, *Blumenthal* v. *United States,* Nos. 54–57, decided December 22, 1947. There was further evidence, however, from which it can reasonably be inferred that these four defendants were common and key figures in all the specific corrupt transactions described, and which removes all doubt that they were members of the unitary conspiracy to obstruct justice as charged. This further evidence may be recapitulated as follows:

(1) Eva Smith's testimony that she began to notice that whenever Judge Johnson was in possession of money from corrupt sources it was always shortly after he had seen Donald (*supra,* pp. 36–37);

(2) Houck's testimony that Donald Johnson's visits with his father "became more frequent as time went on" and, further, that Donald used frequently to ask him, Houck, questions about cases pending in court in which he was not an attorney of record (*supra,* p. 37);

(3) Greenes' sweeping claim to Katz that he could "fix" cases in the federal court in Scranton (*supra,* p. 39), a claim which he substantiated in the *Korman* case;

(4) Beacham's testimony that Greenes was a "frequent visitor" of Donald Johnson, the visits occurring sometimes several times a week (*supra,* p. 39);

(5) Beatrice Moran's testimony that Greenes visited Donald Johnson weekly, though not a client, and that Greenes would sometimes leave an envelope with her for Donald when the latter was out (*supra*, p. 39);

(6) Martin's testimony that he observed Greenes and Donald Johnson entering Judge Johnson's chambers together on half a dozen occasions when Judge Johnson was there (*supra*, p. 40);

(7) Beatrice Tighe's testimony that Greenes, though not a client of Memolo, used to visit him from two to eleven times a week, and that on three to five occasions she drew checks on Memolo's account at his direction, cashed them, and delivered the money to Greenes on the street or in the hallway of the building (*supra*, p. 40);

(8) Houck's testimony that several of the orders signed by Judge Johnson were on "blue backers" of Memolo (*supra*, p. 37);

The cumulative force of this further evidence, we submit, proves beyond doubt that Donald Johnson, Greenes, and Memolo did not merely enter from time to time into individual, particular, "small" conspiracies with one or another of themselves, Judge Johnson, and others, but that all four were parties to a single general conspiracy, unlimited in its scope, to obstruct justice and defraud the United States as charged. Their joint trial, consequently, was proper under the

rule of the *Kotteakos* case. See also *Canella* v. *United States*, 157 F. 2d 470 (C. C. A. 9).[10]

2. Petitioner Johnson's further contention that the evidence is insufficient to support the verdict as to him (Pet. 31–34) is patently without merit. The evidence already reviewed in connection with Johnson's first contention necessarily included much of the evidence directed against him specifically. The only evidence already reviewed which may not be considered in determining the sufficiency of the evidence against him specifically

[10] It was necessary, of course, for Judge Johnson, Donald Johnson, Memolo, and Greenes, in carrying out their over-all conspiracy, to enter into particular corrupt agreements from time to time with other persons in connection with the various court proceedings that were to be affected by their grand conspiracy. Thus Kilcullen was brought into their broad plan in connection with the *Mount Jessup* case, Maloney in the *Pennsylvania Central Brewing Company* and *Williamsport* cases, Townsend and Moore in the *Williamsport* case, etc. It must be emphasized that this case involves no question as to the propriety of trying such "temporary" participants in the main fraud jointly with its four "permanent" members. The persons in this case having a thus limited relation to the grand conspiracy occupied positions similar to those of Kotteakos, Lekacos, and Regenbogen in the *Kotteakos* case, and of Wyckoff and McCormac in the *Canella* case. The four "grand conspirators," on the other hand, occupied positions precisely analogous to those of Canella and Campbell in the *Canella* case (see 157 F. 2d, at 478–479). Similarly, if in the *Kotteakos* case two or more "common and key" figures be postulated in place of the actual single figure, Brown, the members of the grand conspiracy here would be analogous to them. In short, to use the "wheel" figure of the *Kotteakos* case, Judge Johnson, Donald Johnson, Memolo, and Greenes constituted the center of the wheel, whose spokes connected them with the many persons in the same category as Kilcullen, Maloney, Townsend, and Moore.

is the evidence that he conspired with Michael, Reifsnyder, and the others involved in the *Central Forging Company* case fraudulently to abstract $3,000 from the bankrupt estate and that he received $2,500 of this money himself (see (b) (15) and (16) under point 1, *supra*). The reason why that evidence may not be considered as against Johnson is explained in note 6, *supra*, p. 32. Even eliminating this evidence from consideration, however, the remaining evidence against him plainly warranted his conviction (see (b) (3), (6), (13), and (14), and (c) (1), (2), (4), (5), and (6) under point 1). There is, moreover, the following additional evidence against Johnson:

(1) Michael's testimony that in May 1944 and again sometime between July 8 and August 24, 1944, Donald Johnson came to ask him whether he, Michael, was being investigated (*supra*, p. 33). These were obviously not missions of innocence.

(2) The $350 check incident. Abe Greenes testified that he drew a $350 check to Donald Johnson's order in 1942 at the request of his brother Jacob and gave it to Jacob in exchange for $350 in cash. Abe did not know the purpose of the transaction, but in 1944, he admitted, he and Jacob decided on a false "story to tell" about the check—the "story" being that the check was in payment of a fee owed by Abe to Donald for his having procured Abe's cigar-stand concession. The corrupt nature of this payment is conclusively

shown by the F. B. I. agent's testimony that a $350 item was added to the entries in Donald Johnson's cash book for October 1942 sometime between April 1944 and the trial. (*Supra*, pp. 38–39.) The jury were fully justified in inferring that this corrupt payment to Donald Johnson had some connection with the conspiracy charged.

It is not, of course, a valid criticism of the Government's case against petitioner Johnson to say that the evidence against him was largely circumstantial, since conspiracy can often be proved in no other way. *United States* v. *Manton*, 107 F. 2d 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664. Two courts have upheld the sufficiency of the evidence to warrant submission of the question of Johnson's guilt to the jury. There is clearly no occasion for this Court to disturb their findings. Cf. *Delaney* v. *United States*, 263 U. S. 586, 589–590.[11]

3. Petitioner Johnson's further contention that the Government failed to prove the commission of an overt act within the limitations period (Pet. 35–42) is also without merit.[12]

[11] Petitioner Greenes also challenges the adequacy of the proof of a general conspiracy and the sufficiency of the evidence to sustain his conviction (Pet. 11–13). In view, however, of his admissions before the grand jury, in which he fully confessed his major role in the vast conspiracy, his contentions in this respect obviously require no answer.

[12] Petitioner Greenes also makes this contention (Pet. 13–15), but it scarcely can be taken seriously in view of the fact that his grand jury testimony contained numerous admissions of overt acts committed within three years of the indictment's return (see pp. 10, 35, *supra*).

The indictment was returned on September 11, 1945 (R. 1) and the jury were instructed that they must find that an overt act in furtherance of the conspiracy was committed within three years prior thereto (R. 814, 863). The following overt acts were proved to have been committed within that period:

> (1) Greenes' sending of the $350 check to petitioner Johnson on or about October 7, 1942 (*supra*, p. 38);
>
> (2) Michael's commission of perjury, on August 24, 1944, before the grand jury which subsequently indicted him and others in the *Central Forging Company* case, for the admitted purpose of protecting Donald Johnson; he adhered to this false testimony until he pleaded guilty to that indictment on June 19, 1945 (*supra*, p. 33);[13]
>
> (3) Michael's filing of his first and final account as successor trustee in the *Central Forging Company* case on July 9, 1943 (*supra*, p. 30) (alleged overt act No. 33, R. 1084);
>
> (4) Judge Johnson's sentencing of Koppelman on July 29, 1943 (*supra*, pp. 34–35) (alleged overt act No. 6, R. 1082).

It is true that the first two of these overt acts were not alleged in the indictment, and that the trial judge instructed the jury that they were required to find that "an overt act as charged"

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[13] Since it was part of the conspiracy charged to conceal its existence (R. 1080), Michael's perjury was clearly an overt act in furtherance of it.

was committed (R. 814; see also R. 821, 863). However, that instruction was obviously too favorable to the defendants (as Johnson admits (Pet. 35, 41)), since it is well-settled that the Government is not limited in its proof to the overt acts charged. *Lias* v. *United States,* 51 F. 2d 215, 217 (C. C. A. 4), affirmed, 284 U. S. 584; *Meyers* v. *United States,* 36 F. 2d 859, 861 (C. C. A. 3), certiorari denied, 281 U. S. 735; *Worthington* v. *United States,* 1 F. 2d 154, 155 (C. C. A. 7), certiorari denied, 266 U. S. 626.[14] It is also true that the third of the above overt acts was one of the items of evidence which the jury were instructed not to consider as against petitioner Johnson (see note 6, *supra,* p. 32). It was, however, admissible as against all other defendants, and consequently the jury were entitled to consider it in determining whether the conspiracy charged had continued to within the limitations period, even though they could not consider it in weighing the specific question of the guilt of petitioner Johnson. In any event, the fourth of the above-listed overt acts was both

[14] Furthermore, there can be no question as to the fact of Donald Johnson's receipt of the $350 check, since he admitted it, his only contention being that it was an innocent fee payment by Abe Greenes (*supra,* p. 38). The Government's proof to the contrary, however, which included the testimony of Abe himself that the "story" about the $350 being a fee was purely imaginary, was overwhelming (*supra,* pp. 38–39).

alleged and proved and was admissible against all defendants.[15]

4. Petitioner Johnson's further contention (Pet. 42–44, 6–7) that the trial judge erred in applying the doctrine of collateral estoppel is likewise unmeritorious. As we pointed out in note 6, *supra,* p. 32, Johnson had previously been acquitted of conspiring with Michael, Reifsnyder,

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[15] It should be pointed out, moreover, that the trial judge's instruction that the jury were required to find an overt act that occurred after September 11, 1942 (three years prior to the indictment's return) was far more favorable to the defendants than was required, in view of the special war-time statute tolling the statute of limitations for certain offenses. That statute (Act of August 24, 1942, c. 555, § 1, 56 Stat. 747, as amended by the Act of July 1, 1944, c. 358, § 19 (b), 58 Stat. 667 (18 U. S. C., Supp. V, 590a)) provides in pertinent part:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run * * *."

This statute was directly applicable to the offense alleged in the instant indictment, which charged a conspiracy to defraud the United States as well as to obstruct justice (*supra,* pp. 4–5). Its applicability was evidently overlooked at the trial. The effect of the statute was to make the crucial date so far as the statute of limitations was concerned—i. e., the date after which an overt act was required to be found—not September 11, 1942, as the jury were told, but August 24, 1939 (three years prior to the enactment of the above statute).

and the others involved in the *Central Forging Company* case to abstract $3,000 from the bankrupt estate of that company, and of committing the substantive offense. The indictment in the earlier case and the verdict of acquittal as to Johnson were received in evidence in the instant case (note 6, *supra*), and the jury were instructed, in effect, that in weighing the question of Johnson's guilt or innocence they were to assume his innocence of the charges in the *Central Forging Company* indictment (R. 888–889). They were expressly told that they could "not retry as to Donald Johnson the charges in the [*Central Forging*] indictment" (R. 888). Moreover, the judge went much farther than necessary by his further instruction that the jury could not consider as against Johnson any evidence which tended to prove any of the five overt acts mentioned in the earlier indictment of which evidence was received in this case (R. 889). One of those overt acts, the judge explained, was the alleged receipt by Johnson of $2,500, and even though he did not believe that "that fact was squarely an issue in that case," [16] he nevertheless told them,

[16] In his opinion overruling motions for judgments of acquittal notwithstanding the verdicts, the judge explained, as follows, why he believed that Johnson's acquittal in the *Central Forging* case did not by any means necessarily establish that the jury found that Johnson did not receive this $2,500: "It is perfectly apparent in this connection that Donald Johnson may have received the money as charged in the former indictment as an overt act, but the jury might have

in order to be "perfectly sure" that Johnson's rights were fully protected, that they could not consider even that evidence against him in this case. Under the doctrine of collateral estoppel, all that the judge was required to tell the jury was that Johnson's acquittal in the earlier case established, for this case, his innocence of the charges in the earlier case. See *United States* v. *De Angelo,* 138 F. 2d 466 (C. C. A. 3). Clearly he was not required to tell them that they could not consider in this case evidence of the overt acts allegedly committed in furtherance of the conspiracy charged in the earlier case, since it is evident that the jury in that case might very well have believed those acts to have been proved and still have thought Johnson innocent of the charges of the indictment, which was all that their verdict of not guilty established.

5. Both petitioners contend (Johnson Pet. 44–45; Greenes Pet. 16–18) that the trial judge should have declared a mistrial because the prosecutor, in his rebuttal argument to the jury, called defense witness Moore a "criminal conspirator as

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found that he had no idea that the money came from the trustee or was part of the assets of the bankrupt estate. He may have thought that it was part of the legitimate fees allowed to the attorneys which was paid to him on account of his supposed influence" (R. 933). He stated that his instruction to ignore Johnson's receipt of this $2,500 in considering his connection with the conspiracy charged in this case went "very much further than defendant Donald Johnson was entitled to have the court go under any rule whatsoever" (R. 933–934).

established by the evidence in this case" (see R. 796–797). It is claimed that "there was absolutely no basis" for this remark (Johnson Pet. 44). The contentions are patently insubstantial. The evidence adduced (pp. 14–22, *supra*) proves beyond question that the prosecutor's characterization of Moore, far from being false or exaggerated, was no more than fair comment. Defense counsel, in his summation, had previously extolled Moore as a man of "fine qualities" (Tr. 3700), "an example of an honest man and a good fellow" (Tr. 3701), and a "fine old gentleman" (Tr. 3703). It was fair rebuttal, therefore, for the prosecutor to portray him to the jury in the truer light.

6. In *Edgington* v. *United States*, 164 U. S. 361, this Court held that an instruction that "evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt" (p. 366) was erroneous, observing (*ibid.*):

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create

> a reasonable doubt, although without it the other evidence would be convincing.

Petitioner Johnson contends that the instructions in this case in respect of character evidence failed to meet the requirements laid down in the *Edgington* case (Pet. 46–50). This contention is also meritless. The judge made it perfectly clear to the jury that they were to convict if they had no reasonable doubt of guilt after considering all the evidence, including the evidence of good reputation, and, conversely, that they were to acquit if they had such a doubt after considering all the evidence, likewise including the evidence of good reputation (R. 895–896). This instruction was clearly correct. It is true, as stated in the *Edgington* case, that "The circumstances may be such that an established reputation for good character * * * would alone create a reasonable doubt," but plainly this Court did not mean thereby to imply that a jury had to be so instructed *in haec verba,* as Johnson seems to assume. Rather, this Court was merely stating what might result in some cases from the jury's application of the correct rule. It is uniformly held to be proper to refuse a charge that evidence of good reputation may alone suffice to create a reasonable doubt. *Boehm* v. *United States,* 123 F. 2d 791, 812 (C. C. A. 8), certiorari denied, 315 U. S. 800; *Haffa* v. *United States,* 36 F. 2d 1, 5 (C. C. A. 7), certiorari denied, 281 U. S. 727; *Kreiner* v. *United States,* 11 F. 2d 722, 726 (C.

C. A. 2), certiorari denied, 271 U. S. 688; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C. C. A. 3), certiorari denied, 260 U. S. 735.

7. Petitioner Johnson further contends that the trial judge erred in not instructing the jury that they must find the dates of the beginning and end of the conspiracy on the ground, apparently, that in the absence of such an instruction the jury might have based their verdict of guilty on improper acts not connected with the conspiracy charged (Pet. 50–51). However, the jury were told that they must find that the conspiracy alleged existed and that it continued to within three years of the indictment's return (R. 814). They were further cautioned that "even if the parties hereto are proven guilty of having done unlawful acts that might otherwise be defined as crimes, the only crime that they can be convicted of under this indictment is the crime of conspiracy" (R. 819). The judge also made it abundantly clear to the jury that the defendants were on trial only for the broad general conspiracy charged and that even if the jury believed beyond a doubt that a number of "subsidiary conspiracies" had been proved, that would not suffice to warrant verdicts of guilty (R. 831–832). There were similar instructions to the same effect, moreover, which fully covered the matter (see R. 826–829, 831–832). Consequently there is no basis whatever for this contention.

8. Both petitioners urge that the trial judge invaded the province of the jury by telling them that some of the overt acts alleged had been proved (Johnson Pet. 51–52; Greenes Pet. 18–22). The allegedly offending remarks of the judge are as follows (R. 821):

> In the indictment in the case at Bar there are charged forty-six overt acts * * *. Some of them have been proved by the United States.

It is manifest from the context in which these words occur, however (see the language which immediately follows), that by "overt acts" the judge meant nothing more than acts in the objective sense—i. e., dissociated from any possible corruptness arising from their having been done to further the objects of the alleged conspiracy. That some overt acts in this sense had been established was conceded (see R. 901–902). The judge very clearly left it to the jury to decide whether such acts or any others they might find had been committed for the purpose of furthering the objects of the conspiracy. Subsequently, moreover, after his charge had been criticized by counsel (R. 900–902), the judge supplemented his prior instructions in this respect in such a way as to leave no possible doubt that it was the jury's function to determine whether an overt act done to further the conspiracy had been proved (R. 907). No further criticism of the charge in this respect was made.

9. The Government introduced in evidence petitioner Greenes' admissions made before the grand jury on two days (R. 1103). Greenes contends that it was error to permit the Government to introduce these admissions without also requiring it to introduce the remainder of his testimony before that body, given on thirteen other days (Pet. 23–26). There is no merit in the contention. The rule that if part of an admission is introduced the remainder must also be introduced means no more, as the court below pointed out, than that any admissions against interest must be "given sufficiently in their context so that the jury may have an accurate notion of what was said and under what circumstances" (R. 1231).

Here, the admissions received consisted of Greenes' complete, word-for-word testimony on two successive days, and there was no attempt whatever to select only the most damaging admissions, torn from context. Plainly there was no reason, as the court below observed (*ibid.*), "why the record should have been unduly cluttered with all the Grand Jury testimony." See *Medlock* v. *State,* 108 Tex. Cr. 274, 279; *Shaw* v. *State,* 73 Tex. Cr. 337, 339; cf. *Schoborg* v. *United States,* 264 Fed. 1, 9 (C. C. A. 6), certiorari denied, 253 U. S. 494.

CONCLUSION

The judgments below are correct, and no conflicts of decisions are involved. We therefore

respectfully submit that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 459

DONALD M. JOHNSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR REHEARING

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Donald M. Johnson,
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The United States of America

PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of Supreme Court of the United States:

Donald M. Johnson, Petitioner, respectfully prays that he be granted a rehearing in the matter of his Petition for Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, which Writ was denied by your Honorable Court on January 12, 1948, and as grounds for such rehearing sets forth the following:

1. In his Petition for Writ of Certiorari, the said Donald M. Johnson alleged as a reason for the allow-

ance of the Writ that the decision of the said Circuit Court was in conflict with the decisions of this Court relative to the requirement that an overt act be committed within the statutory period in order to convict him of conspiracy under 18 USCA §88.

2. In its Brief, page 58, the Government stated that the following overt acts were proven to have been committed within the statutory period:

(1) Greenes' sending of the $350 check; (2) Michael's commission of perjury before the Grand Jury; (3) Michael's filing of his First and Final Account as Trustee in the Central Forging case; and (4) Judge Johnson's sentencing of Koppelman.

3. In its said Brief, page 58, the Government admitted that the jury was instructed by the Trial Judge that in order to convict they must find "an overt act as charged", and that two of the overt acts were not alleged in the Indictment, and therefore were not before the jury as overt acts; said two alleged overt acts are (1) Greenes' sending of the $350 check to Johnson on or about October 2, 1942; and (2) Michael's commission of perjury on August 24, 1944.

4. The third alleged overt act, namely, Michael's filing of his Account in the Central Forging case, was not available against Donald M. Johnson because the Trial Judge expressly so ruled in his Charge to the Jury (889a), and the Circuit Court of Appeals decided that the said matter of Michael's filing could not be used against your Petitioner (1226).

5. The fourth alleged overt act, namely, the sentencing of Koppelman, was not available likewise against Donald M. Johnson because it was proven only by the testimony of Jacob Greenes, co-defendant, before the Grand Jury, which testimony was read into the record in this case; it was admitted only against Greenes, and so limited by the Trial Judge in his Charge (868a). The Circuit Court also decided that the Koppelman matter having been proven only by Grand Jury admissions was available against the person who made the admission, namely, Greenes, and therefore, not against Donald M. Johnson (1226).

6. The Government in its Answer, at page 59-60, states that the fourth of the above-listed overt acts, namely the Koppelman matter, was both alleged and proved, and was admissible against all defendants. This is a misstatement of the fact. The Koppelman matter was proven as above-indicated, only by the Grand Jury testimony of Greenes, and was by the Court limited to Greenes, and the Circuit Court in its Opinion so considered the matter.

7. The only alleged overt act within the statutory period proven against Donald M. Johnson was the sending of the $350 check from Abe Greenes to him, and admittedly this matter was not before the jury as an overt act, not having been charged as such in the Indictment, and therefore the ruling of the Circuit Court that the jury might base its conviction of Donald M. Johnson upon this incident was without legal foundation.

8. We respectfully submit that this admission by the Government in its Brief (service of which was accepted by the attorney for the Petitioner on January 9, 1948) that the Trial Judge required the jury to find such overt acts as were alleged as overt acts in the Indictment, and that the sending of the $350 check was not alleged in the Indictment, is such an intervening circumstance of controlling effect as to require a rehearing in this case, there being no competent and admissible evidence to connect Petitioner with any overt act charged in the Indictment after September 11, 1942.

9. The argument made by the Government that it could have proven acts not alleged in the Indictment and that the jury could have based its verdict upon such acts is correct in the abstract, but in this case the jury was required to follow the instruction of the Trial Judge, and therefore to find an overt act as charged and not some other act which might appear somewhere in the proof, and therefore it did not consider such other acts.

10. The Government also points out in the footnote, on page 60, of its Brief, that the Statute of Limitations was tolled during the War, and therefore the crucial date, September 11, 1942, was not correct, and that this matter was evidently overlooked at the trial. Regardless of the fact that the tolling of the Statute of Limitations was overlooked, the record shows that for the purpose of this case at least the Statute was not tolled because it was the duty of the Government's attorneys to call that matter to the attention of the court if they intended to rely upon such tolling of Statute.

Not having done so, the Government cannot now complain. As we attempted to show in our Petition and Brief, the jury was bound by the law as given to them by the Trial Judge in his Charge; to this point, the Government wholly fails to reply.

11. A further reason for granting a rehearing is that since the filing of our Petition the Supreme Court has handed down its Opinion, on January 5, 1948, in the case of *Robert Sealfon v. United States,* at 174 October Term, 1947, reversing his conviction. This decision bears on the question of res adjudicata, viz, that *all* of the facts which had been proven in the Central Forging Company case, in which a verdict of acquittal was entered as to Donald M. Johnson, were res adjudicata in the present case. The Circuit Court, in our case, stated that the law as quoted on the question of res adjudicata was correct, but refused to apply it to the facts of our case. One of the objections raised by Petitioner at the trial was that he was not permitted to show the facts which had been proven in the Central Forging case, and to read that record into the evidence so that the jury might compare those facts with the facts which were being submitted by the Government on the same matter. In our case, the Trial Judge merely told the jury that *any overt act* which was alleged in the Indictment in the Central Forging case and which was alleged also in the Indictment in the present case could not be considered against Donald M. Johnson. In speaking of res adjudicata, this court says in the Sealfon case that the question is "whether the jury's verdict in the conspiracy trial was a determination favorable to

the Petitioner of the *facts* essential to the conviction of the substantive offense. This depends upon the *facts* adduced at each trial, and the instructions under which the jury arrived at its verdict at the first trial." In our case, the question is whether the verdict in the Central Forging case was a determination favorable to Petitioner of the *facts* essential to conviction in the present case. It will be noted that the word "facts" is used and not "overt acts", and this is the whole foundation of our complaint of the action of the Trial Court in this regard: that it limited the comparison to *overt acts*, and refused to consider the *facts* of the cases.

Respectfully submitted,

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Attorneys for Petitioner.

CERTIFICATE

I, Charles J. Margiotti, counsel for Donald M. Johnson, Petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further, that the Petition is restricted to the grounds specified in Amended Rule 33 (2), viz., intervening circumstances of substantial or controlling effect, being the admissions of the Government in its Answer relative to overt acts, which show that there was no overt act which the jury could legally find against this Petitioner, and, therefore, his conviction was in violation of 18 USCA §88, and also the misstatement of the Government that testimony relative to the Koppelman case was available against all defendants; and secondly, the filing of the Opinion of the Supreme Court in the Sealfon case, after the Petition for Writ of Certiorari had been filed.

CHARLES J. MARGIOTTI,
Counsel for Petitioner